ANNUAL REPORT 2009-10
Dear Minister

**Annual Report 2009-10**

I am pleased to present to you the seventh Annual Report on the operations of the Victorian Small Business Commissioner, covering the period 1 July 2009 to 30 June 2010.

The Report is provided to you under s14(1) of the *Small Business Commissioner Act 2003* (‘the Act’), in order for you to cause the Report to be laid before each House of Parliament as required under s14(2) of the Act.

Yours sincerely

Peter Lisle

Acting Small Business Commissioner
# ANNUAL REPORT OF THE VICTORIAN SMALL BUSINESS COMMISSIONER 2009-10

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By letter dated 7 May 2010 I was appointed by the Minister for Small Business to the position of Acting Small Business Commissioner for a period of six months commencing 10 May 2010. This followed the appointment of Mr Mark Brennan to the position of Director, Liquor Licensing. Mr Brennan was the first Victorian Small Business Commissioner, having been appointed to the role in 2003. I wish Mr Brennan every success in his new role.

I am pleased to acknowledge the excellent support provided by the VSBC team, particularly across the transition period.

Under the Small Business Commissioner Act 2003, the purpose of the VSBC is ‘to enhance a competitive and fair operating environment for small business in Victoria.’ This Report marks another year of significant activity for the Office.

It is noteworthy that considerable interest has been shown by a number of other States in the Small Business Commissioner model. Representatives have visited the VSBC to discuss the role and structure of the Office to inform further consideration of the introduction of a similar role in their jurisdictions.

A senior VSBC manager was seconded to the Victorian Bushfire Reconstruction and Recovery Authority (VBRRA) for most of the 2009-10 year to work on business recovery issues. The officer played an important role in providing advice to small businesses in bushfire-affected areas, linking them to a range of recovery services and resolving a broad range of problems. Matters subsequently referred to the VSBC by VBRRA were resolved by preliminary assistance or mediation at no cost to the parties. I am very pleased that the VSBC was able to assist VBRRA this way.

A major evaluation of the VSBC will take place in 2010, the outcomes of which will inform its strategic planning into the future.

I thank Mr Howard Ronaldson, Secretary of the Department of Innovation, Industry and Regional Development (DIIRD) for his support. I also wish to acknowledge, more generally, the importance of the continuing support provided by DIIRD to the VSBC.

Yours sincerely

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The VSBC notes that the State Government has sought to enshrine ADR in law, under the Civil Procedure Bill 2010. According to the Explanatory Memorandum accompanying this Bill:

'...it seeks to build a culture in which litigants are encouraged to resolve their cases without going to court…Litigation should be regarded as a measure of last resort...

...it seeks to build a culture within the court system that supports and encourages litigants and their lawyers to use reasonable endeavours to achieve early resolution of cases by agreement, using [ADR] where appropriate or to narrow the issues in dispute...'

The VSBC supports these sentiments.

The VSBC strongly supports the use of ADR to resolve small business disputes. This includes the mediation of complaints, as well as the important precursor to VSBC dispute resolution – preliminary assistance.

The VSBC contributed to the development of ADR during 2009-10 via submissions to two independent inquiries – the Victorian Competition and Efficiency Commission (VCEC) ‘Inquiry into Streamlining Local Government Regulation’ (‘Local Government Inquiry’); and the Expert Panel appointed to advise on ‘Strengthening the Franchising Code of Conduct and the Unconscionable Conduct Provisions of the Trade Practices Act 1974’ (‘Franchising Inquiry’). In its February 2010 Report, the Expert Panel commented on the positive role played by organisations such as the VSBC:

'Organisations of this kind are a significant means of fostering improved business conduct in relation to small business, and particularly by way of reducing and mitigating disputes.'

The VSBC welcomes these comments.
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The VSBC welcomes these comments.

As the above demonstrates, the VSBC supports the use of ADR to resolve private sector small business disputes. The VSBC also supports the use of ADR to resolve public sector small business complaints. To this end, the VSBC has written to the Attorney-General seeking amendment to the ‘State of Victoria’s Obligation to Act as a Model Litigant’ (‘Model Litigant Guidelines’). The Attorney has responded positively to this proposal.

A further development concerning ADR and the VSBC involves a Report released by the State Services Authority (SSA) concerning its ‘Review of the Mining Warden’ (www.ssa.vic.gov.au). One of the recommendations of this Report, released in December 2009, is a two-stage dispute resolution process for disputes under the Mineral Resources (Sustainable Development) Act 1993. This proposal would see the VSBC resolving mining industry disputes, akin to the procedure under both the Retail Leases Act 2003 and Owner Drivers and Forestry Contractors Act 2005.

The VSBC has previously commented on the desirability of extending this model to complaints under the Small Business Commissioner Act 2003 and for commercial tenancy dispute resolution.

All of the above developments are consistent with the VSBC’s continuing ADR role. In particular, the VSBC supports the use of preliminary assistance, as well as pre-litigation mediation, to resolve small business disputes.

The VSBC supports the use of ADR to resolve small business disputes by way of preliminary assistance, (pre-litigation) mediation, facilitated meetings, and promoting informed decision-making (and improving business conduct).
IMPROVING BUSINESS CONDUCT

Improving business conduct remains an ongoing VSBC project.

This issue has been highlighted in successive Annual Reports. It remains an issue of continuing importance.

The VSBC continues to work to improve business conduct in Victoria.

The issue applies to all legislation administered by the VSBC – the Small Business Commissioner Act 2003, the Retail Leases Act 2003 and the Owner Drivers and Forestry Contractors Act 2005. This is because improving business conduct applies to all small business relationships, whether they are business-to-business, retail leasing or owner driver related.

The VSBC continues to inform and educate businesses on the issue of improving business conduct. This includes producing a report, ‘Forming and Maintaining Winning Business Relationships’ and reinforcing the seven characteristics for success in a business relationship (see table).

<table>
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<th>SEVEN ESSENTIAL BEHAVIOURS FOR SUCCESSFUL BUSINESS RELATIONSHIPS</th>
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<td><strong>Alignment</strong></td>
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Professional conduct is vital in all interactions between businesses and should be a prerequisite for any business to business relationship. Many of the behaviours associated with professional conduct are commonsense but can be the difference between a successful relationship and another not getting off the ground, and

Pre-agreed dispute resolution procedures ensure that there is rapid and satisfactory resolution of any issues.

(From Forming and Maintaining Winning Business Relationships – Report by VSBC)

The VSBC expects that improved business conduct will:

- reduce the incidence of business disputes;
- reduce the cost of business disputes arising from unacceptable business conduct;
- reduce the personal and social costs associated with the dispute process;
- raise awareness within the business community of appropriate business conduct; and
- encourage mechanisms to improve exchanges between businesses.

The VSBC has initiated some collaborative action with industry to address issues of concern with the pallets system. The matter was initially raised with the VSBC by the Victorian Transport Association (VTA).

FRANCHISING DISPUTES

In recent years, franchising disputes have become a focus for the VSBC under the Small Business Commissioner Act 2003.

The role of the VSBC in resolving franchising disputes is reflected in the VSBC’s attendance at meetings of the Australian Competition and Consumer Commission’s (ACCC) Franchising Consultative Committee and Small Business Consultative Committee.

Franchising disputes come before the VSBC as alleged ‘unfair market practices’ under the Small Business Commissioner Act 2003. As the VSBC has previously commented, while this expression is not defined under the Act, the VSBC considers it is an expression of the broadest possible meaning. It includes any acts or omissions by any private sector or government entity in the course of business dealings or dealings related to business, regulatory or otherwise, within Victoria.
Due to the regular incidence of franchising disputes, the VSBC made a formal submission to the Franchising Inquiry in December 2009 (copy of submission available at www.sbc.vic.gov.au). The VSBC submission details the experience of the VSBC in resolving franchising disputes.

As this submission explains, the benefit of a small business lodging a franchising dispute with the VSBC is at least twofold:

1. The VSBC may not only mediate franchising disputes, it may also investigate the conduct of the parties. This may, in itself, lead to a resolution of the dispute.

2. To the extent the VSBC mediates franchising disputes, using its panel of independent, experienced, mediators, the service is low-cost ($195 per day for each party), speedy and accessible. These considerations are relevant for all parties (franchisee and franchisor alike).

The VSBC is achieving similar mediation success rates for franchising disputes as it is for mediations under the Retail Leases Act 2003 and the Owner Drivers and Forestry Contractors Act 2005.

The VSBC mediation success rate, for all business-to-business disputes, including franchising disputes, is consistently around 80%.

As part of his response to this Inquiry, the Federal Minister announced that Commonwealth small business mediation services would become faster and simpler. The VSBC welcomes this announcement.

The VSBC also considers that many franchising disputes, as well as other business-to-business disputes, could be averted if the parties improved their business conduct towards each other. Accordingly, the VSBC Improving Business Conduct study is of relevance to franchising relationships.

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### Improving Business Conduct applies to all business relationships, including franchising relationships.

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The VSBC is successfully resolving franchising disputes under the Small Business Commissioner Act 2003.

In its 2010 Report, the Franchising Inquiry Expert Panel commented on dispute resolution, acknowledging that the VSBC assists small businesses:

‘Small businesses often operate only in one jurisdiction, which may explain the interest of state governments in establishing such bodies as the VSBC. It is therefore appropriate that the States and Territories provide mechanisms facilitating early intervention in small business disputes, and the VSBC and the Small Business Development Corporation represent an effective model of achieving that end.”
One of the functions of the VSBC under the Small Business Commissioner Act 2003 is to promote informed decision-making by small businesses in order to minimise disputes with other businesses. In 2009-10, the VSBC continued its objective of promoting informed decision-making by small business through its information and education function. This involved dissemination of information through:

> its website (www.sbc.vic.gov.au);
> Business Victoria;
> VSBC preliminary assistance processes;
> Fraud Week, providing ongoing assistance and awareness of scams;
> presentations to stakeholder and business groups;
> maintaining relationships with stakeholders; and
> publishing information.

**VSBC Website**

Following the relaunch of the site in June 2009, the VSBC website (www.sbc.vic.gov.au) has continued to provide up-to-date information to small businesses, retail landlords and tenants, solicitors, real estate agents, owner drivers, forestry contractors and hirers.

The website contains all the forms required for referring disputes and complaints to the VSBC, as well as legislative information and responsibilities of the VSBC under the Small Business Commissioner Act 2003, Retail Leases Act 2003 and Owner Drivers and Forestry Contractors Act 2005. In addition, visitors to the site have the opportunity to send queries to the VSBC.

The information on the VSBC website will continue to be reviewed to ensure it is relevant and up-to-date for users of VSBC services.
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**PRELIMINARY ASSISTANCE – PHONE ENQUIRIES**

A significant element of the VSBC work involves taking calls from small business and providing assistance on issues.

Queries made to the VSBC can result in many matters being resolved prior to becoming a dispute. VSBC staff can provide assistance on the legislative responsibilities of the parties which can, in many cases, avert the need for a formal dispute application being made.

During 2009-10, the VSBC provided a prime point of contact for landlords, tenants and small businesses seeking guidance on retail tenancy, small business and owner driver and forestry contractor issues.

The majority of incoming calls concern commercial leasing matters. While some calls are from ‘repeat callers’, most are from small businesses contacting the VSBC for the first time, seeking assistance on a particular issue. The VSBC handling of calls is an important mechanism by which information may be provided to landlords, tenants, agents and the legal profession.

In the retail tenancy area, this type of assistance helps callers to fully understand their rights and obligations under retail tenancy legislation with a view to full compliance and avoidance of disputes. When disputes arise and cannot be settled between the parties, information is provided as to appropriate ways of settling those disputes, including VSBC mediation, proceeding to the Victorian Civil and Administrative Tribunal (VCAT), or other appropriate jurisdictions.

Small businesses also call to discuss commercial and contractual disputes. If the call raises an ‘unfair market practice’ issue, the VSBC ascertains the circumstances and assists with the appropriate course of action. This may involve formal referral of the matter to the VSBC under the *Small Business Commissioner Act* 2003. Alternatively, it may involve referring the caller to another appropriate body (e.g. ACCC).
The VSBC also assists contractors and hirers under the *Owner Drivers and Forestry Contractors Act 2005*. In addition to the alternative dispute resolution service for owner drivers, forestry contractors, haulage contractors and their hirers, the VSBC provides preliminary assistance to the parties to ensure they are fully aware of their rights and obligations.

Examples of areas dealt with by the VSBC under its preliminary assistance function are:

> Informing small businesses of their rights and avenues of redress in cases of disputed contracts or contract terms.
> Informing landlords of the procedure and obligations in preparing leases and disclosure statements.
> Informing tenants as to their right to appropriate notices at the end of a lease or before they exercise an option to renew their lease.
> Informing parties about the Commissioner’s power to appoint a Specialist Retail Valuer to determine rental disputes.
> Informing landlords as to their obligation to repair and maintain premises.
> Advising contractors and hirers about their rights and obligations.
> Informing small business about their rights and obligations in dealings with Government departments, agencies and local councils.
> Assistance in resolving disputes between the parties without the need for a formal dispute process.

In 2009-10, the total number of preliminary assistance calls was 6,931 compared with 7,581 in 2008-09, a decrease of 8.6%. The number of calls in 2009-10 is slightly more than double the number of preliminary assistance calls recorded in the first full year of operation, 2003-04. The total number of preliminary assistance calls handled by the VSBC since its inception increased to 44,873 at 30 June 2010.

**TABLE 2.1: PRELIMINARY ASSISTANCE**

<table>
<thead>
<tr>
<th>Month</th>
<th>Phone enquiries handled by the VSBC*</th>
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<tbody>
<tr>
<td></td>
<td>2007-08</td>
</tr>
<tr>
<td>July</td>
<td>553</td>
</tr>
<tr>
<td>August</td>
<td>732</td>
</tr>
<tr>
<td>September</td>
<td>531</td>
</tr>
<tr>
<td>October</td>
<td>638</td>
</tr>
<tr>
<td>November</td>
<td>534</td>
</tr>
<tr>
<td>December</td>
<td>411</td>
</tr>
<tr>
<td>January</td>
<td>517</td>
</tr>
<tr>
<td>February</td>
<td>606</td>
</tr>
<tr>
<td>March</td>
<td>505</td>
</tr>
<tr>
<td>April</td>
<td>665</td>
</tr>
<tr>
<td>May</td>
<td>763</td>
</tr>
<tr>
<td>June</td>
<td>790</td>
</tr>
<tr>
<td>Total</td>
<td>7,235</td>
</tr>
</tbody>
</table>

**TABLE 2.2: PRELIMINARY ASSISTANCE 1 MAY 03 – 30 JUNE 10**

<table>
<thead>
<tr>
<th>Preliminary Assistance</th>
<th>Phone enquiries handled by the VSBC*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002-03 (May-June)</td>
<td>482</td>
</tr>
<tr>
<td>2003-04</td>
<td>3,463</td>
</tr>
<tr>
<td>2004-05</td>
<td>5,903</td>
</tr>
<tr>
<td>2005-06</td>
<td>5,960</td>
</tr>
<tr>
<td>2006-07</td>
<td>7,418</td>
</tr>
<tr>
<td>2007-08</td>
<td>7,235</td>
</tr>
<tr>
<td>2008-09</td>
<td>7,581</td>
</tr>
<tr>
<td>2009-10</td>
<td>6,931</td>
</tr>
<tr>
<td>Total 1 May 03 – 30 June 10</td>
<td>44,873</td>
</tr>
</tbody>
</table>

*Some enquiries may be originally taken by Business Victoria and then referred to the VSBC. Similarly, phone enquiries may sometimes lead to lodgement of a retail lease or small business dispute, or a dispute referral may be reclassified as Preliminary Assistance following discussion with the applicant.

**SCAMS**

The VSBC aims to educate and inform small business about the ongoing incidence of potential scams. Issues raised with the VSBC include false billing from directories and advertising, fax back, office supply, domain name renewal and business opportunity scams.

*Preliminary assistance is a vital tool in the VSBC resolving small business disputes.*
The VSBC collaborates with the ACCC to promote education and awareness of scams during Fraud Week. Minimising the risk of becoming a scam victim is an important aspect of this week.

The VSBC recommends a number of ways to protect small business against fraud:

> Not giving out any information about your business unless you know who you are giving it to and how that information is being used;
> Keeping written records of all orders and purchases;
> Making sure you only deal with people you know and trust;
> Limiting how many people in your organisation have authority to buy or order anything;
> Being wary when you operate your business over the internet – small businesses are major targets of phishing scams or domain name renewal scams;
> Being aware that a business trading online is responsible for recouping any losses generated by credit card fraud;
> Seeking independent advice where products or services involve a significant amount of money or other commitment;
> Not allowing tactics like bullying, negotiations for a lower price or charges for unordered/unused goods affect your decision; and
> Being especially careful about the way you store and manage your customers’ details.

SCAM CASE STUDY

A small business was contacted regarding advertising its business in a doctor’s surgery via a television in the waiting room. After giving details to direct debit its bank account and having a contract faxed to the business, it waited for the expected upturn in business. After a few months, the small business rang the doctor’s surgery and discovered advertising was never run on the television in the waiting room.

The small business contacted the VSBC for assistance. The VSBC contacted the company offering the advertising which claimed it was not aware of any problem with the TV. After representations by the VSBC, the company allowed the small business to cancel the contract without penalty.

INDUSTRY, BUSINESS AND COMMUNITY PRESENTATIONS

As part of its information and education role, the VSBC has a continuing program of advising business and industry groups. These presentations provide an effective forum for the VSBC to inform and educate businesses throughout the State and are an important means for obtaining stakeholder feedback.

During 2009-10, the VSBC made presentations to a number of industry organisations, including the Real Estate Institute of Victoria, Law Institute of Victoria, CPA Australia, Australian Property Institute, VTA and the Institute of Chartered Accountants.

Additionally, the VSBC made regular appearances on the community radio program designed to provide information for small business, entitled ‘The Illegals’ on radio 3WBC 94.1FM. This program is streamed to a further 39 community radio outlets.

The VSBC continued its strong regional focus. The Office participated in small business exhibitions including the Franchising Expo and Regional Development Victoria Roadshows.

BROCHURES

The VSBC produces a range of brochures to inform and educate the small business community about its services, including:

> Speaking up for small business
> Forming and Maintaining Winning Business Relationships
> Mediation and Alternative Dispute Resolution
> Investigations
> Reviewing Government Practices
> Business Scams

These brochures are available in hard copy and on the VSBC website.

The VSBC produces a newsletter which is accessible via the website and sent to subscribers.
The VSBC investigation function arises mainly under its general legislation, the Small Business Commissioner Act 2003. As the VSBC also has a compliance role under the Retail Leases Act 2003, the Office also investigates matters under that Act. The VSBC has a dedicated alternative dispute resolution role under the Owner Drivers and Forestry Contractors Act 2005.

The VSBC has previously commented on the desirability of aligning its dispute resolution role under all three pieces of legislation it administers. This would mean that unresolved complaints and disputes under all three Acts could then be determined by VCAT. This is not currently the case under the Small Business Commissioner Act 2003. The VSBC still sees merit in this proposal.

During 2009-10, the VSBC received a record number of complaints under the Small Business Commissioner Act 2003—343 applications. This is a 15% increase on the 299 complaints during 2008-09. This is commensurate with the increasing number of matters generally coming before the VSBC under all its jurisdictions.

The VSBC experienced a significant increase in ‘unfair market practice’ complaints during 2009-10. Small business complaints under the Small Business Commissioner Act 2003 are lodged as ‘unfair market practices’. The VSBC has commented on this expression in previous Annual Reports. As it is not defined under the Act, in the VSBC view, it is an expression of the broadest possible meaning. It includes any acts or omissions by any private sector or government entity in the course of business dealings or dealings related to business, regulatory or otherwise, within Victoria.

VSBC investigations cover a wide range of matters including allegations of breaches of contract, misrepresentation in business dealings and business activities in the nature of unconscionable conduct, private sector contractual and franchising disputes, business licensing requirements, local government issues and compliance with onerous regulatory requirements.
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Under the Small Business Commissioner Act 2003, the VSBC may investigate and mediate these small business complaints. The VSBC preference for dealing with these complaints, consistent with the purpose of the Act, is to first seek to resolve the actual complaint – by preliminary assistance, at first instance; by mediation, if preliminary assistance is not successful; and by investigation, if the previous steps are not successful, or if a Respondent refuses to participate in mediation.

During 2009-10, the VSBC amended its standard initial letters under the Small Business Commissioner Act 2003 to reinforce the fact that the VSBC is seeking to resolve the complaint, rather than conduct a formal investigation. This depends, however, on the circumstances of each case.

The VSBC seeks to resolve complaints by making initial inquiries in a consultative manner, involving all parties in the process. The VSBC considers that this approach facilitates the commercial resolution of such cases.

As the VSBC has previously found that many small business complaints could have been avoided, or better managed, the VSBC procedure is to write to the Chief Executive Officer, or equivalent, of the Respondent organisation, to bring the issue to their attention. This is consistent with the VSBC Improving Business Conduct study and applies to both private and public sector small business complaints.

In cases which cannot be resolved by preliminary assistance or mediation, the VSBC may investigate the matter. This involves the VSBC preparing a draft Report, which may contain findings and recommendations; providing the draft Report to the parties, for their comment; finalising the Report, and providing it to the parties, and any other appropriate person or body, such as the Minister for Small Business.

An investigation and related final Report is very much the exception, not the norm. This is because all parties generally see the merits in participating in some form of dispute resolution, to seek to resolve the issue, rather than open-ended, uncertain, investigation.
INVESTIGATIONS CASE STUDY

A small business complained to the VSBC about its dealings with a franchisee and franchisor. The small business had been awarded a significant prize at a business function involving both the franchisee and franchisor. When the small business later sought to claim the prize, it was unable to do so as the franchisee was no longer operating.

The VSBC made initial inquiries with both the franchisee and franchisor about the matter. As these inquiries did not resolve the complaint, and as the franchisor refused to attend mediation, the VSBC continued to investigate the matter.

As part of its investigation, the VSBC prepared a draft Report. The draft Report made certain Findings and Recommendations. The VSBC provided the draft Report to all parties – small business, franchisee and franchisor – for their comment, prior to finalisation. This is standard VSBC procedure, as it provides all parties with an opportunity to comment, before finalisation of the Report.

After considering the draft Report, the franchisor advised the VSBC that it accepted its Recommendation. As a consequence, the VSBC did not finalise the Report. This is because the VSBC investigation, via its draft Report, resolved the matter.

Under s84(1)(b) of the Retail Leases Act 2003, the VSBC has the function of taking proceedings for offences under the Act. No proceedings were commenced against any party for an offence under the Retail Leases Act 2003 in 2009-10.

Where possible breaches occur, the VSBC may send warning letters to the offender. The VSBC considers that warning letters are a useful educative and/or information tool to assist compliance. The warning letter procedure is more instructive and educative, rather than punitive. The VSBC has previously issued warning letters concerning:

> s15 – copy of lease and/or copy of VSBC information brochure to be provided at commencement of negotiations;
> s16 – lease must be in writing and signed by all parties;
> s23 – seeking/accepting payment of key money or goodwill; and
> s25 – landlord’s notification of lease.

The VSBC has resolved other cases by accepting undertakings from landlords to refrain from engaging in future conduct in contravention of the Retail Leases Act 2003.

REPRESENTATIONS

In addition to its investigation and mediation function, the VSBC has a representation function under s5(2)(d) of the Small Business Commissioner Act 2003. The VSBC makes representations about both private and public sector complaints.

Under s5(2)(d) of the Act, the VSBC may make representations ‘to an appropriate person or body in respect of alleged unfair market practices’. The nature and content of this representation depends on the circumstances of the case.

This person or body may be another regulatory body, such as the ACCC, with its responsibilities under the Trade Practices Act 1974(Cth) or Consumer Affairs Victoria, with its responsibilities under the Fair Trading Act 1999(Vic). It may be the Minister for Small Business, as the Minister has administrative responsibility for the Small Business Commissioner Act 2003.

During 2009-10, the VSBC made various representations to regulators, government departments and agencies and other related bodies.
The VSBC enjoys a constructive and complementary relationship with regulatory agencies, such as the ACCC. The VSBC meets with the ACCC to discuss issues of mutual interest. The VSBC also has Observer status at the ACCC Small Business Consultative Committee and Franchising Consultative Committee.

The VSBC appreciates the support of the ACCC Deputy Chair, Dr Michael Schaper, on matters relating to small business.

**INDUSTRY CODES**

Under s5(2)(j) of the *Small Business Commissioner Act 2003*, one of the functions of the VSBC concerns industry codes of practice. The role of the VSBC here is to improve the regulatory environment for small business and provide a mediation service for the resolution of disputes between parties in affected industries. This role is consistent with the main purpose of the *Small Business Commissioner Act 2003*.

The VSBC has a role under three industry codes:

> the Packaged Liquor Licensees Code of Conduct (made under the *Liquor Control Reform Act 1998*);

> the Code relating to the sale and supply of memorialisation goods and services by cemetery trusts and other alternative suppliers in Victorian public cemeteries; and

> the Owner Drivers and Forestry Contractors Code of Practice (made under the *Owner Drivers and Forestry Contractors Regulations 2006*).
The mediation and alternative dispute resolution functions assigned to the VSBC under the Small Business Commissioner Act 2003, the Retail Leases Act 2003 and the Owner Drivers and Forestry Contractors Act 2005 is of central importance to the role of the VSBC. The objective of these functions is the timely, low-cost resolution of disputes through facilitated agreement between the parties, promoting the maintenance of the existing business relationships and ensuring clarity, fairness and certainty in the interactions between businesses.

PRELIMINARY ASSISTANCE

An important element of the VSBC’s dispute resolution process is the number of disputes resolved through preliminary assistance by VSBC staff prior to mediation. Increasingly, matters are being dealt with in this way. Of the 1219 matters finalised by the VSBC during 2009-10, 34.1% (416) were settled prior to mediation.

WHAT IS PRELIMINARY ASSISTANCE?

VSBC preliminary assistance that results in a dispute being resolved without the need for formal mediation, can take many forms. Some matters settled in this way are complicated and protracted; others may involve relatively minor issues and will be resolved quickly.

Once an application has been referred to the VSBC, preliminary assistance may involve:

- contacting both parties by telephone and working out a solution to the initial complaint. In some cases, the respondent may raise additional issues which will also be dealt with by the VSBC. If the parties reach agreement, the file will be closed.
- providing legislative information to the parties regarding their responsibilities. For example, a dispute about whether a retail tenant is required to pay land tax can be easily resolved by referring the parties to section 50 of the Retail Leases Act 2003 which states that a landlord cannot pass land tax on to a retail tenant as an outgoing.
- discussing the matter with the respondent who then considers the parties can work through the problems without mediation.
- arranging to meet with one or both of the parties informally at the VSBC offices to discuss, and possibly resolve, the issues in dispute.
OFFICE OF THE VICTORIAN SMALL BUSINESS COMMISSIONER
ANNUAL REPORT 2009-10

The mediation and alternative dispute resolution functions assigned to the VSBC under the Small Business Commissioner Act 2003, the Retail Leases Act 2003 and the Owner Drivers and Forestry Contractors Act 2005 is of central importance to the role of the VSBC. The objective of these functions is the timely, low-cost resolution of disputes through facilitated agreement between the parties, promoting the maintenance of the existing business relationships and ensuring clarity, fairness and certainty in the interactions between businesses.

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> discussing the matter with the respondent who then considers the parties can work through the problems without mediation.

> arranging to meet with one or both of the parties informally at the VSBC offices to discuss, and possibly resolve, the issues in dispute.

> arranging a mediation date but continuing to assist the parties to resolve the dispute. If the matter is resolved, the file will be closed. If not, mediation proceeds.

Under the Small Business Commissioner Act 2003, when alerting a respondent party to a complaint, the Small Business Commissioner writes to the Chief Executive Officer. This procedure is important to the dispute resolution process, as such senior people may be unaware of the actual complaint. Many matters under the Small Business Commissioner Act 2003 are resolved in this way, without mediation, due to the involvement of the Chief Executive Officer.

In addition to resolving disputes through preliminary assistance following receipt of a formal application, many general queries made to the VSBC can result in matters being resolved before an application is made. VSBC staff can provide assistance on the legislative responsibilities of the parties which can, in many cases, mean that a formal dispute application is not required.

Preliminary assistance will be a continued focus for the VSBC.

PRELIMINARY ASSISTANCE CASE STUDY
The owner of a small business contacted the VSBC by phone when his landlord informed him that he would not be granted a further five year term on his lease (despite having a number of options for further terms) because he had not informed the landlord he wished to exercise his option by the date specified in the lease.

The tenant was informed by the VSBC that, under section 28 of the Retail Leases Act 2003, it is the landlord’s responsibility to notify the tenant at least 6 months (but no more than 12 months) before the date after which the option is no longer exercisable. The tenant tried to inform the landlord’s solicitor of the landlord’s obligations to him. However, due to language and communication difficulties, this was not understood.

Subsequently the tenant referred the matter to the VSBC, and a VSBC staff member dealt with the matter by explaining section 28 to the landlord and his solicitor. The tenant was able to exercise his option and has continued to run his small business.
**LEGISLATIVE BACKGROUND AND COSTS**

The VSBC has a dispute resolution function under the *Small Business Commissioner Act 2003*, the *Retail Leases Act 2003* and the *Owner Drivers and Forestry Contractors Act 2005*.

The *Retail Leases Act 2003* provides that a dispute in relation to a retail lease covered by the Act may only be the subject of VCAT proceedings if the VSBC has certified that mediation or other form of alternative dispute resolution has failed or is unlikely to resolve it. The requirement for such certification does not apply to proceedings for an order in the nature of an injunction.

Mediation is not available where the dispute solely relates to the payment of rent or for disputes between landlords and tenants on the rental amount to apply as a result of a market review of the rent. In the latter case, the *Retail Leases Act 2003* provides that, in the event of a failure of the landlord and tenant to agree on the rental to apply as a result of a market review, and a failure of the landlord and tenant to agree on an independent specialist retail valuer to determine the rent, the VSBC may appoint a suitably experienced and qualified valuer as a specialist retail valuer for this purpose.

Similarly, the *Owner Drivers and Forestry Contractors Act 2005* provides that owner driver and forestry contractor disputes must first be referred for alternative dispute resolution and may be the subject of proceedings before VCAT only if the VSBC has certified in writing that alternative dispute resolution has failed, or is unlikely, to resolve it. Again, the requirement for such certification does not apply to proceedings for an order in the nature of an injunction.

The VSBC Panel of Dispute Resolution is used to select a suitably qualified person to undertake mediation or alternative dispute resolution.

In relation to retail tenancy disputes under the *Retail Leases Act 2003*, s84(2) provides that:

> 'In arranging for the resolution of retail tenancy disputes, the Commissioner must have regard to the need for the mediation or other form of alternative dispute resolution to be conducted by persons who are experienced in the field of retail premises leases.‘

Similarly, s54(2) of the *Owner Drivers and Forestry Contractors Act 2005* provides that:

> 'In arranging for the resolution of disputes, the Commissioner must have regard to the need for the mediation or other form of alternative dispute resolution to be conducted by persons who are experienced in the field of regulated contracts.‘

The cost of mediations conducted by the VSBC is $195 per day for each party for matters under both the *Small Business Commissioner Act 2003* and *Retail Leases Act 2003*.

The VSBC mediators are paid $900 per mediation session (inc. GST) and the VSBC subsidises the remaining $510 daily fee paid to the mediators.

With regard to the *Owner Drivers and Forestry Contractors Act 2005*, consistent with the Government commitments to those industries, the cost of mediation under this legislation is $95 per day for each party, with the VSBC subsidising the remaining $710 daily fee paid to mediators.

The mediators are entitled to claim payment for all reasonable expenses they incur in association with mediation, alternative dispute resolution or attempted resolution of a dispute. Costs eligible for expenses claim include reasonable costs for accommodation, meals, private vehicle usage, and other verifiable out-of-pocket expenses.

**RESULTS**

During 2009-10, 1,380 matters were referred to the VSBC, compared to 1,362 in the same period in 2008-09, representing an increase of 1.3%. Compared to the same period in the VSBC’s first year of operation (543 matters), the number of matters has increased by more then 150%. Referrals by month received are shown in Table 4.1.
There were 1,219 matters completed in 2009-10, an increase of 9.8% compared to 2008-09. Of those, 933 were matters submitted in 2009-10 and 286 were matters adjourned from previous years.

Of the 631 matters completed as a result of the pre-mediation assistance provided by the VSBC following receipt of an application, 416 were settled without proceeding to formal mediation and 215 were closed as there was no agreement by one or both of the parties to participate in the dispute resolution process.

Five hundred and eighty-eight (588) matters were completed through formal mediation. To facilitate the mediation process, and considering that a mediation may be conducted over more than one session, the VSBC arranged 868 mediation sessions of which 617 were actually held in 2009-10. The remaining were either rescheduled or cancelled. There were two main reasons for cancellations: the matter settled in the interim, or any of the parties, or both, changed their position and withdrew from the dispute resolution process. The improved internal procedures introduced during the year for scheduling mediations resulted in a reduction in the number of rescheduled and cancelled mediations of almost 30% – from 357 in 2008-09 to 251 in 2009-10.
The VSBC is sensitive to the needs of parties in arranging mediations. Seventy-three (73) mediation sessions were held at a venue outside the VSBC offices: 52 mediations were held in regional Victoria (most of them in the rooms provided by the Victorian Government’s Business Centres) and 21 at the office of a representative of one of the parties. In situations where availability of mediation rooms causes delays in the mediation arrangements, the offers to provide appropriate rooms by parties’ representatives at no cost to the VSBC was crucial in arranging suitable mediation dates, especially in a number of urgent matters.

Interpreter services were arranged for 12 mediation sessions during this period.

**TABLE 4.5: INTERPRETER SERVICES PROVIDED IN THE PERIOD 1 JULY 2009 TO 30 JUNE 2010**

<table>
<thead>
<tr>
<th>Language</th>
<th>Mediation Sessions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandarin</td>
<td>6</td>
</tr>
<tr>
<td>Cantonese</td>
<td>4</td>
</tr>
<tr>
<td>Vietnamese</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>12</strong></td>
</tr>
</tbody>
</table>

**RETAIL LEASING MATTERS**

There were 995 retail tenancy matters submitted in 2009-10, a 3% decrease from the previous year. Of the total number of applicants who submitted referrals of retail tenancy disputes, including specialist retail valuer matters and ministerial determinations, 633 (63.6%) were tenants, 353 (35.59%) were landlords and 9 (0.9%) were assignees.

**TABLE 4.6: DISPUTE RESOLUTION UNDER RLA ACT 2003 IN THE PERIOD 1 JULY 2009 TO 30 JUNE 2010**

<table>
<thead>
<tr>
<th>Total number of submitted applications</th>
<th>Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>695</td>
</tr>
<tr>
<td>Completed through mediation</td>
<td>390</td>
</tr>
<tr>
<td>Successful Mediation</td>
<td>304</td>
</tr>
<tr>
<td>Mediation unsuccessful</td>
<td>86</td>
</tr>
<tr>
<td>Completed prior to mediation</td>
<td>305</td>
</tr>
<tr>
<td>Settled prior to mediation</td>
<td>208</td>
</tr>
<tr>
<td>No Mediation</td>
<td>97</td>
</tr>
<tr>
<td><strong>Success Rate Total</strong></td>
<td><strong>73.70%</strong></td>
</tr>
<tr>
<td>Mediation</td>
<td><strong>77.90%</strong></td>
</tr>
</tbody>
</table>

Shopping centres were involved in 63 dispute referrals – 6.3% of the total number of retail tenancy disputes, compared to 7.3% in 2008-09. A shopping centre owner was the applicant in 13 cases (20.6% of the referrals involving shopping centres) and the respondent in 50 cases (79.4% of the referrals involving shopping centres). Of the 63 referred disputes involving shopping centres, 50 were completed prior to 30 June 2010 with a success rate of 62%. Thirty-nine (39) of those were matters in which the shopping centre was the respondent and they successfully settled in 64% of cases, which is significantly lower compared to more than 83% in 2008-09.

**SMALL BUSINESS COMPLAINTS**

There were 343 matters referred to the VSBC under the Small Business Commissioner Act 2003 compared to 299 matters in the previous year, an increase of 14.7%.

**TABLE 4.7: DISPUTE RESOLUTION UNDER SBC ACT 2003 IN THE PERIOD 1 JULY 2009 TO 30 JUNE 2010**

<table>
<thead>
<tr>
<th>Total number of submitted applications</th>
<th>Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>206</td>
</tr>
<tr>
<td>Completed through mediation</td>
<td>37</td>
</tr>
<tr>
<td>Successful Mediation</td>
<td>31</td>
</tr>
<tr>
<td>Mediation unsuccessful</td>
<td>6</td>
</tr>
<tr>
<td>Completed prior to mediation</td>
<td>169</td>
</tr>
<tr>
<td>Settled prior to mediation</td>
<td>114</td>
</tr>
<tr>
<td>No Mediation</td>
<td>55</td>
</tr>
<tr>
<td><strong>Success Rate Total</strong></td>
<td><strong>70.40%</strong></td>
</tr>
<tr>
<td>Mediation</td>
<td><strong>83.80%</strong></td>
</tr>
</tbody>
</table>

**OWNER DRIVERS AND FORESTRY CONTRACTORS DISPUTES**

During 2009-10, forty-two (42) owner driver and forestry contractor disputes were referred to the VSBC under the Owner Drivers and Forestry Contractors Act 2005, an increase of 13.5% on the previous year. Thirty-two (32) matters were completed with an 81.3% success rate.
TABLE 4.8: DISPUTE RESOLUTION UNDER ODFC ACT 2005 IN THE PERIOD 1 JULY 2009 TO 30 JUNE 2010

<table>
<thead>
<tr>
<th>Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of submitted applications</td>
<td>42</td>
</tr>
<tr>
<td>Completed</td>
<td>32</td>
</tr>
<tr>
<td>Completed through mediation</td>
<td>26</td>
</tr>
<tr>
<td>Successful Mediation</td>
<td>22</td>
</tr>
<tr>
<td>Mediation unsuccessful</td>
<td>4</td>
</tr>
<tr>
<td>Completed prior to mediation</td>
<td>6</td>
</tr>
<tr>
<td>Settled prior to mediation</td>
<td>4</td>
</tr>
<tr>
<td>No Mediation</td>
<td>2</td>
</tr>
<tr>
<td>Success Rate Total</td>
<td>81.30%</td>
</tr>
<tr>
<td>Mediation</td>
<td>84.60%</td>
</tr>
</tbody>
</table>

VSBC MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION PROCESS

The VSBC has powers under the Retail Leases Act 2003 to arrange for mediation in disputes relating to retail leases, and under the Small Business Commissioner Act 2003 in matters where a small business has complained of unfair market practices.

In the case of disputes relating to retail leases, no action may be taken in VCAT other than an action in the nature of an injunction, unless the VSBC certifies that mediation has failed or is unlikely to resolve the dispute.

A dispute relating to a retail lease is referred to the VSBC by an applicant filling in a ‘Referral of a Dispute’ form and mailing, faxing or delivering it to the VSBC, or by an applicant filling in a similar form online via the VSBC website (www.sbc.vic.gov.au).

The referral of dispute form seeks details which will enable the VSBC, or a mediator, to understand the issues and parties involved. The form seeks details of the tenancy, being information on the premises and on the lease (as the date of signing of the lease determines which retail tenancy legislation applies to the lease). It also seeks details of the applicant, the respondent, their representatives (if any) and of the dispute.

An investigation officer within the VSBC will consider the referral form, and may contact the parties to ascertain if the matter may be simply resolved. A letter will be sent to the respondent advising of the referral of a dispute and requesting the respondent to agree to mediation before an independent mediator appointed by the VSBC.

Consistent with the Government’s intention of providing an informal, low-cost dispute resolution process, the cost of this mediation is $195 per day for each party.

If the respondent agrees to mediation, the VSBC arranges a mediator from the Panel of Dispute Resolution and a venue for the mediation. This venue can be outside Melbourne if such a location is more convenient for the parties.

The mediation itself is confidential to the parties, although any settlement agreement reached during mediation may be taken to VCAT or an appropriate Court for enforcement if necessary.

Mediation of a Small Business Commissioner Act complaint regarding an alleged unfair market practice is similar, but normally involves greater investigatory work by the VSBC. Notification of such complaints may also be made using a form available on the VSBC website.

The process for disputes submitted under the Owner Drivers and Forestry Contractors Act 2005 is similar to the process under the Retail Leases Act 2003. As mentioned previously, the cost of mediation under this legislation is $95 per day for each party.
### MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION CASE STUDY 1

A tenant sought mediation under the *Retail Leases Act 2003* in relation to the landlord’s alleged misrepresentation and unconscionable conduct. The misrepresentation claims revolved around future representations made by the landlord and its leasing agents as to the tenancy mix, location of brand-name tenants, customer traffic, sales turnover and the redevelopment of the centre in which the tenant was located.

The landlord counter-claimed for damages from the tenant as a result of arrears of rent and outgoings and the tenant abandoning the leased premises.

The legal basis of the claim and counter-claim masked the fact that the centre was undergoing substantial redevelopment and refurbishment, had many vacancies as a result of the global financial crisis and many tenants were struggling financially. The landlord, being aware of the tenant’s difficulties, provided rent discounts both during the redevelopment and for a honeymoon period after the refurbishment of the centre.

At mediation, the alleged misrepresentations by the landlord were discussed. It was shown that the landlord’s tenancy mix as represented was in fact correct, and the redevelopment plans were fully disclosed. The misrepresentation claims, while arguable, were going to be difficult for the tenant to prove without going through a long and expensive hearing at VCAT.

The parties also discussed the substantial rent arrears along with possible damages for future rent owing for the balance of the unexpired lease term. The mediator canvassed the possibility of the tenant going back into the premises on agreeable terms, as the fit-out was still in place and the tenant’s stock could easily be returned to the premises.

The parties finally resolved the dispute by the tenant agreeing to withdraw its claim and the landlord agreeing to withdraw a claim for arrears on the basis that the tenant entered into a new short term lease on a reduced rental.

The settlement was in fact a ‘win-win’ for both parties. The landlord had retained a good, although financially affected tenant in the centre and the tenant was given an opportunity to continue to trade at the reduced rental terms.

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### MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION CASE STUDY 2

A dispute was referred to the VSBC for mediation under the *Owner Drivers and Forestry Contractors Act 2005* (‘the Act’). The key issues in dispute involved the driver claiming termination without the notice required under the Act, having invested in a new truck on the expectation of a long term agreement following a representation to that effect, thus believing he was entitled to compensation under the Act.

The hirer company claimed that it was entitled to terminate the driver on the basis that the driver refused to perform an allocated job and to comply with reasonable instructions to make deliveries to specified clients. The driver claimed that the required delivery route was outside the standard route agreed between the parties, and that the contract rate was struck on the basis that the driver would not have to drive a significant distance outside the agreed route. The driver also alleged that the occupational health and safety status of the new client site had not been verified by the hirer. Notwithstanding this, the driver claimed that the grounds for termination required notice to be given under the Act, and that the conduct in no way justified an immediate termination under the ‘serious and wilful misconduct’ provisions of the Act.

The parties detailed their arguments in mediation. The mediator invited the parties to focus on the commercial side of the dispute and the potential risks for both parties in taking the matter to VCAT for determination.

Following several mediation sessions, the parties finally resolved their dispute on a commercial basis. The termination allowed the driver to continue to work at alternative sites, requiring him to make some changes to his truck. The parties also agreed on a sum of money by way of compensation for termination.
CLIENT SATISFACTION SURVEY

The VSBC conducted a client satisfaction survey during the year in which parties involved in mediation were asked to complete a questionnaire and rate the services provided. A total of 686 forms were returned during this period. Most of the responses came from the applicants (45.4%) followed by the respondents (34.8%), respondent’s representatives (9.9%) and applicant’s representatives (8.9%).

In general, the results were very positive. The overall mediation service rating achieved a mean score of 4.7/5.0 (client satisfaction of 94%), showing an improvement against the 2008-09 mean score of 4.4/5.0 (client satisfaction of 88%).
One of the functions of the VSBC under the Small Business Commissioner Act 2003 is to ensure more effective relationships between Government agencies and their small business clients and customers. During 2009-10, the main VSBC government practices activities concerned the State Government’s approach towards litigation and streamlining local government regulation. These activities were performed consistent with ss5(2)(a)-(j) of the Small Business Commissioner Act 2003.

Model Litigant Guidelines
The VSBC commented on this issue in its previous Annual Report. Victoria has Guidelines on the State of Victoria’s Obligation to Act as a Model Litigant (Model Litigant Guidelines). These Guidelines require the State, its departments and agencies to ‘behave as a model litigant in the conduct of litigation’.

While the Guidelines require the Government to ‘avoid litigation, wherever possible’, they do not require it to positively consider and/or participate in alternative, or appropriate, dispute resolution (ADR). The VSBC considers that the Model litigant Guidelines should be amended to include ADR. This would require the State to consider using ADR in any litigation involving its small business clients and customers.

In November 2009, the State provided its response to the Parliament of Victoria Law Reform Committee (VLRC) Inquiry into Alternative Dispute Resolution and Restorative Justice. VLRC Recommendation 36 concerned ‘Encouraging ADR through the model litigant guidelines’. In this respect, the Government stated: ‘The Government is also considering this response in the context of the Government’s response to the Civil Justice Review report. This has been the subject of correspondence from the Victorian Small Business Commissioner and is under consideration in consultation with Government Legal Services.’

The VSBC welcomes this development.
VSBC FUNCTIONS: GOVERNMENT PRACTICES

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This has been the subject of correspondence from the Victorian Small Business Commissioner and is under consideration in consultation with Government Legal Services.’

The VSBC welcomes this development.

Since then, the VSBC has reiterated its support for the inclusion of ADR in the Model Litigant Guidelines. The VSBC considers that any amended Guidelines should also apply to local government.

STREAMLINING LOCAL GOVERNMENT REGULATION

During 2009-10, the Victorian Competition and Efficiency Commission (VCEC) commenced an Inquiry into streamlining local government regulation.

As the VSBC has regular dealings with small business and local government, the VSBC made a submission to VCEC (copy of submission available at www.sbc.vic.gov.au).

The VSBC submission indicates that, over six years of operation, the VSBC has dealt with various complaints concerning local government regulation and procurement.

In respect of disputes between small business and local government, the VSBC supports the use of preliminary assistance; pre-litigation mediation; facilitated meetings; and promoting informed decision-making (and improving business conduct).

In respect of procurement, the VSBC considers that local government should:

> publish procurement policies on their websites and provide information on how business can access and win local government work;

> commit to assisting small to medium-sized business, and regional, suppliers access and win tenders;

> commit to complying with the State Government’s Fair Payments policy; and

> respect the rights of both contractors and subcontractors.

The VSBC considers that the Fair Payments policy should be extended across local government and that penalty interest should be automatically paid after 30 days.

In respect of local laws, the VSBC considers that there needs to be greater scrutiny and accountability of local law making and, relevantly, its impact on small business.
In April 2010, VCEC released its Draft Report concerning this Inquiry. The Report notes that the VSBC has a role in regulating or supporting local government procurement in Victoria.

**OTHER GOVERNMENT PRACTICES**

Under the Small Business Commissioner Act 2003, the VSBC seeks to resolve small business complaints against Government in the same manner as complaints involving the private sector. This involves the VSBC making preliminary inquiries with the Secretary, or equivalent, of the Government agency concerned. This may, in turn, lead to mediation, or a facilitated meeting, between the respective parties.

The VSBC appreciates the assistance of State Government departments, agencies and local government in seeking to address small business issues.

**GOVERNMENT PRACTICES CASE STUDY**

A small business lodged a complaint with the VSBC against a local council. The small business was concerned about a proposed fence being built in front of its premises to replace an existing garden bed.

The small business was concerned that the proposed fence would reduce the visibility of the premises to customers and significantly reduce foot traffic.

The VSBC wrote to the Chief Executive Officer of the council making preliminary inquiries. Council responded by providing information about the proposal and indicated it was working with the body corporate representative to resolve the matter.

Following further discussions between the parties and VSBC, the issue was resolved when Council advised the small business that it would not pursue the boundary fence but would allow the area to remain open and the garden bed improved with additional shrubs. This would also improve exposure of the shop front and increase the level of surveillance and artificial light into the car park – a beneficial outcome for both the small business and community.

**SMALL BUSINESS SERVICE CHARTERS**

Under the Small Business Commissioner Act 2003, one of the functions of the VSBC is to encourage the development and implementation of small business service charters within Government to ensure small businesses receive high quality service. Charters are consistent with the Government’s commitment to improving the quality and consistency of service to its small business clients and customers. The Department of Innovation, Industry and Regional Development (DIIRD) has its own charter.
MINISTERIAL DETERMINATIONS
Under Section 5 of the Retail Leases Act 2003 (‘the Act’), the Minister may make determinations excluding the application of the Act in respect to certain retail premises leases (‘the Ministerial Determinations’).

As at 30 June 2010 there have been five Ministerial Determinations made and published in the Victoria Government Gazette. The Ministerial Determinations are available on the VSBC website (www.sbc.vic.gov.au).

Two of these Ministerial Determinations require Certificates to be obtained from the VSBC as evidence that a particular lease is the kind of lease to which the relevant Determination applies. In other words, although the lease relates to retail premises, the lease is excluded from coverage of the Act.

The VSBC received 14 requests for Certificates regarding the two Ministerial Determinations during 2009-10. Of these, nine requests were made under the Ministerial Determination concerning certain 15 year leases, five Certificates were issued and four were refused. There were also five requests made under the Ministerial Determination concerning certain Municipal Council leases, three Certificates were issued and two were refused.

SECTION 21 CERTIFICATES
Section 21 of the Retail Leases Act 2003 provides that the term of a retail premises lease (not being a renewal of a lease, and including all option periods) must be at least five years and any initial lease entered into for a period of less than five years is extended by the Act to a five year term.

This extension by the Act to a five year term does not apply if the VSBC certifies in writing to the tenant that he or a person acting on his behalf, has explained to the tenant the effect of the five year minimum term provisions of the Act, and the tenant has then provided a copy of the s21 Certificate to the landlord, thereby waiving the application of the five year minimum term provision to the lease.

During 2009-2010, the total number of requests received increased to 884. Of these requests, 801 certificates were issued, whilst the remaining requests did not require certificates to be issued or were withdrawn.
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During 2009-2010, the total number of requests received increased to 884. Of these requests, 801 certificates were issued, whilst the remaining requests did not require certificates to be issued or were withdrawn.

Of the certificates that were issued there was a significant increase in the number of tenants who chose not to take on longer term leases as they were unsure of their future needs or wanted to test the business environment before making a long term commitment. Also, as per previous years, a large number of requests were the result of the landlord’s plans to redevelop the premises sometime within the next five years.

There was a marked increase in the number of requests that did not require certificates to be issued. A number of tenants chose to withdraw their request upon being advised of their rights whilst a significant number of requests were associated with leases that met the minimum five year period when options were included.

This increase may relate to the introduction by the VSBC of a new online application facility. As a result of this, landlords or their representatives now have the ability to lodge requests for certificates. Despite the landlord lodging these requests it is the statutory obligation of the VSBC to speak to the tenant prior to issuing a certificate, and such certificates, if issued, can only be provided to the tenant.

**SECTION 21 CERTIFICATES 2009-10**

<table>
<thead>
<tr>
<th>MONTH</th>
<th>CERTIFICATES ISSUED</th>
<th>CERTIFICATES NOT ISSUED</th>
<th>TOTAL APPLICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>July</td>
<td>66</td>
<td>2</td>
<td>68</td>
</tr>
<tr>
<td>August</td>
<td>86</td>
<td>19</td>
<td>105</td>
</tr>
<tr>
<td>September</td>
<td>69</td>
<td>14</td>
<td>83</td>
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<tr>
<td>October</td>
<td>79</td>
<td>8</td>
<td>87</td>
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<tr>
<td>November</td>
<td>74</td>
<td>9</td>
<td>83</td>
</tr>
<tr>
<td>December</td>
<td>50</td>
<td>12</td>
<td>62</td>
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<tr>
<td>January</td>
<td>48</td>
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<tr>
<td>February</td>
<td>65</td>
<td>5</td>
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<td>March</td>
<td>70</td>
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<td>78</td>
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<tr>
<td>April</td>
<td>68</td>
<td>4</td>
<td>72</td>
</tr>
<tr>
<td>May</td>
<td>60</td>
<td>0</td>
<td>60</td>
</tr>
<tr>
<td>June</td>
<td>66</td>
<td>2</td>
<td>68</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>801</strong></td>
<td><strong>83</strong></td>
<td><strong>884</strong></td>
</tr>
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</table>
SECTION 21 CERTIFICATES 2003-2010

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CERTIFICATES ISSUED</th>
<th>CERTIFICATES NOT ISSUED</th>
<th>TOTAL APPLICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
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<tr>
<td>2004-05</td>
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<td>492</td>
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<tr>
<td>2005-06</td>
<td>521</td>
<td>94</td>
<td>615</td>
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<tr>
<td>2006-07</td>
<td>640</td>
<td>27</td>
<td>667</td>
</tr>
<tr>
<td>2007-08</td>
<td>738</td>
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<td>841</td>
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<tr>
<td>2008-09</td>
<td>807</td>
<td>25</td>
<td>832</td>
</tr>
<tr>
<td>2009-10</td>
<td>801</td>
<td>83</td>
<td>884</td>
</tr>
</tbody>
</table>

Under s84(1)(e) of the Act, a function of the VSBC is to confirm whether a s21 certificate has been given. During 2009-10, a small number of landlords and/or their representatives sought confirmation as to whether such certificates had been given. Whilst the VSBC is able to provide them with this information the VSBC is not able to provide them with a certificate or a copy of the certificate.

SECTION 21 CASE STUDY

A request for a waiver certificate was received on behalf of a media company. The tenants were entering into a 12 month lease with an option for a further 12 months. The use of the premises, as described on the application, was very vague. After contacting the tenant it was made clear that this lease would not fall under the Retail Leases Act 2003 as the tenant intended to use the premises to record a television program. As no retail activity would be taking place at the premises a waiver certificate was not required.

SECTION 25 NOTIFICATIONS

Section 25 of the Retail Leases Act 2003 requires that, within 14 days of the signing by all parties of a retail premises lease or renewal, the landlord must notify the VSBC of the address of the premises, the names and addresses of the landlord and tenant and the date when the lease was signed by all parties or renewed.

Section 84(1)(g) provides that the VSBC has the function to create and maintain a register of the information provided under section 25. Section 84(1A) provides that the VSBC may use a register created and maintained under subsection (1)(g) for the purposes only of the performance by the VSBC of his or her functions under this or any other Act.

During 2009-2010, a total of 14,045 notifications were lodged with the VSBC, a slight decrease on the 2008-09 figure. The percentage of online lodgements also decreased, from 86.49% in 2008-09 to 81.95% in 2009-10.

Landlords and agents are encouraged to use the online facility wherever possible. An advantage of using the online facility is that a reference number is immediately generated and a confirmation may be printed by the landlord or agent and held as evidence of compliance with s25.

SECTION 25 NOTIFICATIONS 2009-2010

<table>
<thead>
<tr>
<th>MONTH</th>
<th>HARD COPY</th>
<th>ONLINE</th>
<th>TOTAL</th>
<th>% LODGED ONLINE</th>
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<tbody>
<tr>
<td>July</td>
<td>236</td>
<td>1,119</td>
<td>1,355</td>
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<td>1,329</td>
<td>79.98</td>
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<td>September</td>
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<td>928</td>
<td>1,217</td>
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<td>October</td>
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<td>943</td>
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<td>1,015</td>
<td>1,197</td>
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<td>April</td>
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<td>955</td>
<td>1,110</td>
<td>86.04</td>
</tr>
<tr>
<td>May</td>
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<td>923</td>
<td>1,132</td>
<td>81.54</td>
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<tr>
<td>June</td>
<td>175</td>
<td>1,089</td>
<td>1,264</td>
<td>86.16</td>
</tr>
<tr>
<td>Total</td>
<td>2,535</td>
<td>11,510</td>
<td>14,045</td>
<td>81.95</td>
</tr>
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</table>
### SECTION 25 NOTIFICATIONS 2003-10

<table>
<thead>
<tr>
<th>MONTH</th>
<th>HARD COPY</th>
<th>ONLINE</th>
<th>TOTAL</th>
<th>% LODGED</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002-03</td>
<td>481</td>
<td>n/a</td>
<td>481</td>
<td>n/a</td>
</tr>
<tr>
<td>2003-04</td>
<td>4,901</td>
<td>5,292</td>
<td>10,193</td>
<td>51.9</td>
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<tr>
<td>2004-05</td>
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<td>9,712</td>
<td>14,430</td>
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<tr>
<td>2005-06</td>
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<td>11,440</td>
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<td>79</td>
</tr>
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<td>2006-07</td>
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<td>12,238</td>
<td>14,518</td>
<td>84.3</td>
</tr>
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<td>2007-08</td>
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<td>2008-09</td>
<td>1,956</td>
<td>12,520</td>
<td>14,476</td>
<td>86.49</td>
</tr>
<tr>
<td>2009-10</td>
<td>2,535</td>
<td>11,510</td>
<td>14,045</td>
<td>81.95</td>
</tr>
</tbody>
</table>

Section 25 enables the VSBC to agree with a landlord on a period other than 14 days within which a retail premises lease will be notified. During 2009-10, a small number of requests were made by landlords seeking to extend notification time. The VSBC considered these requests and confirmed in writing that lease details could be notified beyond 14 days.

### SPECIALIST RETAIL VALUERS

The VSBC has responsibility under ss 34, 35 and 37 of the Retail Leases Act 2003, ss 12 and 13 of the Retail Tenancies Reform Act 1998 and ss 10 and 11 of the Retail Tenancies Act 1986 for appointing a specialist retail valuer in cases where a landlord and tenant are unable to agree on the rent to apply as a result of certain circumstances (usually following the application of a rent review provision of the lease), and the landlord and the tenant are unable to agree between themselves on appointment of a specialist retail valuer.

The Retail Leases Act 2003 defines a specialist retail valuer as being:

- for the purposes of a valuation relating to retail premises in a retail shopping centre, a valuer having not less than 5 years experience in valuing retail premises located in regional or sub-regional shopping centres; or

- for the purposes of a valuation relating to any other retail premises, a valuer having not less than 5 years experience in valuing retail premises.

In order to enable the VSBC to identify the most appropriate experienced valuer in a particular case, an agreement exists with both the Australian Property Institute and the Real Estate Institute of Victoria to enable the VSBC to draw on the expertise of either Institute in selecting a specialist retail valuer.

Amendments to ss 12 and 13 of the Retail Tenancies Reform Act 1998 and ss 10 and 11 of the Retail Tenancies Act 1986 (which took effect from 1 November 2003) extended the power of the VSBC to appoint a specialist retail valuer to leases covered by those Acts.

During 2009-10, 93 requests were received by the VSBC for the appointment of a specialist retail valuer. There were 79 such requests in 2008-09.

Whilst tenants and landlords are increasingly aware of the need to make their own attempt to agree to a valuer before approaching the VSBC, there are still a number of enquiries being received where the parties have failed to agree on the rent, but have not attempted to reach agreement on a valuer between themselves (even when the lease provides a precise mechanism for selection of a valuer). The VSBC has responded to these enquiries by pointing out that the VSBC role is one of last resort, and the parties should demonstrate that they have attempted and failed to reach agreement on both the rent and the valuer.

There was a noticeable increase in the number of matters in which either party attempted to stall the rental determination process. The most common methods used included disputing the inclusion of an indemnity clause in the valuer’s terms of appointment and refusing to accept the amount of the valuer’s fee.

When the issue of a valuer’s indemnity is raised the parties are referred to section 7 of the Guidelines to Current Market Rent and Engaging Specialist Retail Valuers published by the VSBC in August 2009. This deals with a valuer’s indemnity.

The VSBC is not involved in setting the fees charged by valuers.
SPECIALIST RETAIL VALUER APPLICATIONS 2009-10

<table>
<thead>
<tr>
<th>MONTH</th>
<th>REQUESTS MADE</th>
</tr>
</thead>
<tbody>
<tr>
<td>July</td>
<td>10</td>
</tr>
<tr>
<td>August</td>
<td>7</td>
</tr>
<tr>
<td>September</td>
<td>7</td>
</tr>
<tr>
<td>October</td>
<td>8</td>
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<tr>
<td>November</td>
<td>6</td>
</tr>
<tr>
<td>December</td>
<td>10</td>
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<tr>
<td>January</td>
<td>2</td>
</tr>
<tr>
<td>February</td>
<td>9</td>
</tr>
<tr>
<td>March</td>
<td>11</td>
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<tr>
<td>April</td>
<td>9</td>
</tr>
<tr>
<td>May</td>
<td>9</td>
</tr>
<tr>
<td>June</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total for year</strong></td>
<td><strong>93</strong></td>
</tr>
</tbody>
</table>

BREAKDOWN OF SPECIALIST RETAIL VALUER APPLICATIONS RECEIVED 2009-10

<table>
<thead>
<tr>
<th>STAGE OF PROCESS AS OF 31/06/2010</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formal Appointments</td>
<td>50</td>
</tr>
<tr>
<td>Applications Closed or Withdrawn prior to formal appointment</td>
<td>15</td>
</tr>
<tr>
<td>Applications pending or on hold</td>
<td>25</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>93</strong></td>
</tr>
</tbody>
</table>

BREAKDOWN OF SPECIALIST RETAIL VALUER APPLICATIONS HELD OVER FROM 2008-09

<table>
<thead>
<tr>
<th>STAGE OF PROCESS AS OF 31/06/2010</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formal Appointments</td>
<td>8</td>
</tr>
<tr>
<td>Applications Closed or Withdrawn prior to formal appointment</td>
<td>11</td>
</tr>
<tr>
<td>Applications pending or on hold</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>20</strong></td>
</tr>
</tbody>
</table>

SPECIALIST RETAIL VALUER CASE STUDY 1

A landlord failed to respond to attempts by the tenant to contact him. This included not responding to the tenant’s acceptance of a new option, not replying to a rental valuation the tenant had arranged and not participating in negotiations for a valuer to perform an independent determination. The VSBC was asked to appoint a valuer. The valuer appointed by the VSBC did not receive a reply from the landlord and asked the VSBC to intervene. A letter was sent to the landlord advising him of a deadline by which to co-operate with the valuer. It indicated that, failing co-operation, the VSBC would formally appoint the valuer, and the tenant would pay the full cost of the valuer, seeking reimbursement from the landlord at a later date. The landlord chose to co-operate with the valuer. Formal appointment proceeded, thereby enabling completion of the valuation.
SPECIALIST RETAIL VALUER CASE STUDY 2

The commencement date of a new rental was nine months prior to an application for the appointment of a valuer being received by the VSBC.

The application contained evidence to show that the tenant had not been co-operating in attempts to agree on a new rent or a valuer throughout this time.

The procedure for the appointment of a valuer commenced. Prior to the appointment, the tenant’s lawyer contacted the VSBC, concerned that their client would have to pay back rent. They argued that the date for the determination had passed. The VSBC responded that s35(5) of the Act did not preclude the VSBC from appointing a valuer where the landlord had not initiated a review within 90 days from the time for review provided in the lease. Further, the VSBC’s view was that s37 does not suggest that there is a time constraint on the VSBC appointing a valuer.

When the details of the valuer were known, the tenant objected to the choice of valuer, and suggested another valuer to the landlord. The landlord did not accept the objection and decided to pay the full amount of the valuer’s fee if it meant the determination occurred. The valuer, though concerned about possible reaction from the tenant, sought formal appointment from the VSBC.

When the tenant delayed in providing information to the valuer, the parties were advised that the Retail Leases Act 2003 provided for a 45 day time limit following formal appointment for completion of the valuation. Consequently, the rental determination was completed.
The purpose of the Owner Drivers and Forestry Contractors Act 2005 (‘the Act’) is to assist small businesses in the transport and forestry industries.

Other instruments include the Owner Drivers and Forestry Contractors Regulations 2006, which contains the Owner Drivers and Forestry Contractors Code of Practice, Information Booklets, rates and costs schedules and model contracts. The latter are the responsibility of respective Industry Councils established under the Act. As well as the VSBC, these Industry Councils play an important role under the Act.

The above instruments provide certain minimum requirements and protections for contractors, and hirers, in the transport and forestry industries. Beyond these basic provisions, the legislation encourages commercial negotiations between parties to regulated contracts. To facilitate bargaining, the legislation enables the appointment of negotiating agents and an obligation to deal fairly and in good faith during the negotiating process.

The Owner Drivers and Forestry Contractors Act 2005 provides a framework for commercial negotiations between small business contractors and hirers.

Unlike the Retail Leases Act 2003, the Owner Drivers and Forestry Contractors Act 2005 does not contain any penalty provisions for breach of the Act or Regulations. Instead, any such compliance issues are regarded as disputes for purposes of the Act and are subject to dispute resolution provisions.

Under the legislation, the primary role of the VSBC is to provide an alternative dispute resolution service. This includes both preliminary assistance and a mediation service for the resolution of disputes between contractors and hirers and vice versa.

Since the commencement of the legislation, the VSBC has dealt with 159 disputes. This has resulted in 121 mediations being held, 105 of which were successful. The mediation success rate for these disputes is 83.5%. This figure is commensurate with the success rate for mediations held under the Small Business Commissioner Act 2003 and the Retail Leases Act 2003.
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Of these 159 disputes, the VSBC provided preliminary assistance by resolving 30 of these cases (18.9%). This involves the VSBC having discussions with both parties to resolve the dispute without the need for mediation. The VSBC can also play an information and education role in such disputes, advising the parties about their rights and obligations under the Act and Regulations.

Some of these disputes involved multiple contractors and a single hirer. Such disputes are permissible under the *Owner Drivers and Forestry Contractors Act 2005* as it enables joint negotiations.

Mediations conducted under the *Owner Drivers and Forestry Contractors Act 2005* are conducted by the same panel of mediators who perform this function under other legislation administered by the VSBC. Such mediators must have experience in the field of regulated contracts.

Consistent with Government commitments to the transport and forestry industries, the VSBC provides a low-cost, informal, and accessible mediation service to resolve disputes under the Act. VSBC mediators charge $95 per day for each party for mediations under the Act. VSBC mediators charge $95 per day for mediations under other legislation administered by the VSBC. The VSBC subsidises each mediation by $710.00.

Owner driver disputes generally concern two main issues:

> contractual disputes; and
> termination disputes.
Case Study 1

The driver of a heavy vehicle was terminated on notice by his hirer. The contractor was given 26 days’ notice of termination instead of three months as required by the Act.

The contractor lodged a dispute with the VSBC. The VSBC organised mediation between the parties. The mediation focused on how notice should be calculated for purposes of satisfying the requirements of the Act.

The dispute was resolved at mediation where the parties reached a commercial settlement.

Contractual disputes, involving one or more contractors, concern the terms and conditions of regulated contracts. This occurs in the context of either pre-existing written contracts, or no contracts at all. The legislation mandates that regulated contracts must be in writing. In order to facilitate this, the legislation encourages the making of contracts by the requirement to negotiate in good faith, the appointment of negotiating agents, the use of model contracts (developed by industry councils) and VSBC mediation.

The Owner Drivers and Forestry Contractors Act 2005 requires written contracts.

This is consistent with a key VSBC message for small business – be informed, in particular, know your rights and obligations, and you will avoid trouble.

Contractual disputes involving more than a single contractor are a continuing challenge for the VSBC and its mediators to manage. As indicated above, some owner driver disputes involve multiple owner drivers and a single hirer. The challenge for the VSBC is in managing the mediation process because there may be individual contractor circumstances which need to be considered as part of any negotiation and settlement. Such disputes are generally lodged with the VSBC by the Transport Workers Union (TWU), as negotiating agent for the contractors. The VSBC has raised this issue with the TWU.

Case Study 2

A contractor was terminated without notice by his hirer for ‘serious and wilful misconduct’.

The contractor had been requested to make a delivery of goods to a shopping centre. The contractor delivered the goods but the hirer’s customer alleged that the contractor had entered a restricted area and acted in an abusive manner when confronted about his whereabouts. The customer complained to the hirer and the contractor was terminated, without notice, for ‘serious and wilful misconduct’.

The contractor lodged a dispute with the VSBC. The contractor alleged that the hirer had breached the legislation by failing to provide a written contract, Information Booklet and Rates and Costs Schedule. Also, that he had not previously been given any warnings and had not been given an opportunity to defend the instant allegations, which he refuted.

The VSBC organised mediation between the parties. The mediation was successful and the parties reached a commercial settlement.
If VSBC mediation is unsuccessful, or a respondent refuses to attend mediation, the VSBC will, at the request of the aggrieved party, issue a certificate under the legislation. This certificate enables the dispute to proceed to VCAT for determination.

As an alternative to having these disputes determined by VCAT, the TWU has raised the issue of such disputes being determined by the VSBC by arbitration. This is because the VSBC jurisdiction under the legislation concerns ‘alternative dispute resolution’, which includes mediation or another appropriate form of alternative dispute resolution, such as arbitration. The TWU suggestion is interesting in light of broader government moves towards ‘appropriate’ dispute resolution, which includes arbitration.

In respect of notice of termination, if a contractor wishes to waive the requirement to give notice, the legislation provides that the contractor may request a certificate from the VSBC. During 2009-10, the VSBC granted 16 such certificates. This comparatively low number may, again, indicate a lack of awareness about the Act and its requirements.

In this respect, the VSBC considers that the work of the Transport Industry Council and the Forestry Industry Council and their constituent members remains vital. The VSBC attends meetings of these Councils as an Observer and provides information about its alternative dispute resolution role.

The VSBC acknowledges the role of the TWU in producing a regular newsletter entitled ‘Owner Driver News’. The newsletter includes contributions from the TWU, as well as the VTA, VSBC and Minister for Industrial Relations. The newsletter provides valuable information about the requirements of the Owner Drivers and Forestry Contractors Act 2005.
The position of Small Business Commissioner is established under the Small Business Commissioner Act 2003, and is a statutory appointment by the Governor in Council.

VSBC staff are employed by the Department of Innovation, Industry and Regional Development (DIIRD) under Part 3 of the Public Administration Act 2004. DIIRD provides corporate support services to the VSBC. VSBC staff participate in DIIRD corporate training, performance management and HR activities and conform to DIIRD financial and other policies.

Systems
Financial, IT and records management services are provided to the VSBC by the DIIRD corporate services division. Specific database applications for use by the VSBC have been developed in the areas of: disputes management; preliminary enquiries; lease notifications; and section 21 certificates.

In 2009-10, VSBC continued its participation in the DIIRD VERS Implementation Project (VERS – Victorian Electronic Records Strategy). As part of the successful transition into the TRIM Electronic Document and Records Management System, the VSBC implemented the Lotus Notes integration, which allows staff to save e-mails into TRIM and file them with associated documents.

Freedom of Information
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The VSBC operates on an accrual output management framework, in accordance with guidelines issued by the Department of Treasury and Finance. Financial accounting is undertaken for the VSBC by DIIRD.

**Table 10.1 Financial Statement**  
1 July 2009 – 30 June 2010

<table>
<thead>
<tr>
<th>Funding</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
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<tr>
<td>Transfer to DIIRD for the mediation rooms upgrade</td>
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<td><strong>Total</strong></td>
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</tr>
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**TABLE 10.1 FINANCIAL STATEMENT**

**1 JULY 2009 – 30 JUNE 2010**

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The establishment of the Small Business Commissioner in 2003 recognised the vital contribution that small businesses make to the Victorian economy. The aim of the Small Business Commissioner is to assist small and medium sized businesses where they are faced with unfair market conduct by other businesses.

The Small Business Commissioner also has a role in working with Government Departments and agencies to establish small business friendly practices and conduct. Recognising the importance of retail tenancies to the establishment and viability of small businesses, the Small Business Commissioner also has substantial responsibilities under the Retail Leases Act 2003, and specific powers under that Act to register leases, ensure that tenants are aware of their entitlement to an initial 5 year lease term, and to resolve disputes between landlords and tenants in an informal, low cost way.

The powers and functions of the Small Business Commissioner arise from provisions in a number of Acts:

- Small Business Commissioner Act 2003
- Retail Leases Act 2003
- Retail Tenancies Reform Act 1998
- Retail Tenancies Act 1986
- Liquor Control Reform Act 1998
- Victorian Civil and Administrative Tribunal Act 1998
- Owner Drivers and Forestry Contractors Act 2005

Under the Small Business Commissioner Act 2003 the functions of the Small Business Commissioner are to:

- facilitate and encourage the fair treatment of small businesses in their commercial dealings with other businesses in the marketplace;
- promote informed decision-making by small businesses in order to minimise disputes with other businesses;
APPENDIX A – STRATEGY AND OBJECTIVES

The establishment of the Small Business Commissioner in 2003 recognised the vital contribution that small businesses make to the Victorian economy.

The aim of the Small Business Commissioner is to assist small and medium sized businesses where they are faced with unfair market conduct by other businesses.

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- Retail Tenancies Reform Act 1998
- Retail Tenancies Act 1986
- Liquor Control Reform Act 1998
- Victorian Civil and Administrative Tribunal Act 1998
- Owner Drivers and Forestry Contractors Act 2005

Small Business Commissioner Act 2003

Under the Small Business Commissioner Act 2003 the functions of the Small Business Commissioner are to:

- receive and investigate complaints by small businesses regarding unfair market practices and mediate between the parties involved in the complaint;
- make representations to an appropriate person or body on behalf of a small business that has made a complaint regarding unfair market practices;
- monitor and report to the Minister on any emerging trends in market practices that have an adverse effect on small businesses;
- encourage the development and implementation of small business service charters within government to ensure small businesses receive high quality service;
- monitor the operation and effectiveness of those small business service charters;
- as required by the Minister, monitor and report to the Minister on the impact that legislation in Victoria, government procedures and administration have on small businesses;
- as required by the Minister, assist other branches and agencies of government to develop legislation, government procedures and administration that provide alternative ways in which small businesses can comply with the requirements of the legislation, procedures and administration;
- investigate compliance with industry codes;
- advise the Minister on matters for which the Commissioner is responsible; and
- advise the Minister on the operation of the Act.

Retail Leases Act 2003

Under the Retail Leases Act 2003 (the RLA) the functions of the Small Business Commissioner are to:

- facilitate the resolution by mediation, or other form of alternative dispute resolution, of retail tenancy disputes;
- take proceedings for an offence against the RLA;
- endorse a form of standard lease;
- confirm whether a certificate has been given under s21(5) of the RLA;
prepare and publish an information booklet or guidelines about retail leases that may be purchased on demand by members of the public;

> join a person as a party to a mediation of a retail tenancy dispute; and

> for the purposes of the Commissioner performing functions under the RLA, create and maintain a register of the information provided under s25.

Following from these functions, the Small Business Commissioner has the responsibilities of:

> issuing certificates under s21 of the RLA, enabling the tenant to enter into a lease for less than 5 years;

> receiving and recording notifications of leases made by landlords under s25 of the RLA;

> appointing a specialist retail valuer under s34, s35 or s37 of the RLA;

> appointing an independent quantity surveyor under s30 or s55 of the RLA; and

> making arrangements pursuant to s84 or s85 of the RLA for the resolution by mediation or other alternative dispute resolution process of retail tenancy disputes.

**Retail Tenancies Reform Act 1998**

Under the *Retail Tenancies Reform Act 1998*, the Small Business Commissioner was provided with the responsibility of appointing a specialist retail valuer under ss 12 or 13 of the Act.

**Retail Tenancies Act 1986**

Under the *Retail Tenancies Act 1986*, the Small Business Commissioner was provided with the responsibility of appointing a specialist retail valuer under ss 10 or 11 of the Act.

**Liquor Control Reform Act 1998**

Under s11(8) of the *Liquor Control Reform Act 1998*, the Small Business Commissioner has the power to investigate compliance by licensees of packaged liquor licences with a code of conduct established under s11(5) of that Act.

The *Packaged Liquor Code of Conduct* was determined by the then Minister for Consumer Affairs in October 2006.

**Victorian Civil and Administrative Tribunal Act 1998**

Section 73(2A) of the *Victorian Civil and Administrative Tribunal Act 1998* provides that the Small Business Commissioner may intervene at any stage in proceedings before the Tribunal concerning a retail tenancy dispute or proceedings under s8A of the *Fair Trading Act 1999*.

**Owner Drivers and Forestry Contractors Act 2005**

The *Owner Drivers and Forestry Contractors Act 2005* generally commenced in August 2005. Under the *Owner Drivers and Forestry Contractors Act 2005*, the Small Business Commissioner has an alternative dispute resolution function.

**APPENDIX B – BUSINESS PLAN**

The VSBC vision continues to be:

> a business environment that promotes competitiveness and fairness for Victorian small businesses.

> a business and regulatory environment supporting informed decision-making by small businesses.

> a retail tenancies regulatory framework that promotes greater certainty, fairness and clarity in the commercial relationship between landlords and tenants of retail premises, and provides an appropriate mechanism for the prevention or early resolution of disputes.

> a dispute resolution mechanism which assists parties to retail leases disputes, contractor and hirer disputes or commercial disputes referred to the VSBC, to settle such disputes in a low-cost, non-adversarial, environment.

Continued achievement of these elements of the VSBC vision will directly improve the business environment of the State.

During 2009-10, the VSBC initiated an evaluation of its operations to inform its future business planning. This evaluation will be completed in the second half of 2010.
APPENDIX C – CLIENT SERVICE CHARTER

The VSBC has extensive direct contact with members of the public, small businesses, lawyers and agents representing individuals and companies. In addition, the VSBC has extensive dealings with Government departments and agencies.

The VSBC has a Service Charter setting out its service undertakings, and the service expectations which others may have of it. The Service Charter also sets out how to contact and communicate with the VSBC; standards of service that clients may expect; client’s rights and responsibilities; and feedback and complaint avenues. The VSBC Service Charter is accessible on the VSBC website www.sbc.vic.gov.au.