

Guide to Mediation

What is Mediation

Mediation is a process where the parties in a dispute come together to discuss their matter with the assistance of an independent mediator. It is a process of negotiation which assists the parties to identify and explore options for the resolution of their dispute. The mediator will not hand down a decision, but rather help the parties to reach their own agreement.

For mediations arranged by the Office of the Victorian Small Business Commissioner (Office), the mediator will be appointed by the Small Business Commissioner (Commissioner).

Benefits of Mediation

Effective – The mediation success rate of the Office is high and even when parties do not achieve a full settlement at mediation, the process will often clarify the issues that need to be resolved in litigation.

Empowering - Parties participating in mediation are directly engaged in the negotiation of their settlement and are in control of the outcome.

Efficient - Disputes can be highly disruptive to a business in terms of profitability and efficiency. Mediation provides parties with an opportunity for a speedy resolution. It can be arranged within a few weeks after the application is submitted, with most mediations taking less than a full day.

Affordable - Mediations are inexpensive, particularly when compared with the costs of preparing for and attending litigation.

Informal but Structured – Mediations are conducted in a meeting room with the parties seated around a table. Separate rooms are available for each party and the mediator will discuss issues with each party separately and jointly. It is not necessary to have legal representation during the mediation process. However, some parties in mediation feel more comfortable if they are accompanied by a lawyer or another representative of their choice.

Flexible - The mediator does not apply strict rules but adapts the process to the circumstances of the dispute and the personalities of the parties involved.

Creative – Mediation allows for creative and business-driven solutions rather than legal judgements.

Non-adversarial – By utilising mediation, parties are able to address and resolve their issues in a less stressful environment and in a non-confrontational way, enhancing the likelihood of continuing their business relationship.

Confidential - the discussions that occur during the mediation cannot be used by the parties in any other legal proceedings.

How to prepare for your mediation

First of all, it is essential for the success of the whole process that you attend the mediation in person, even if you intend to have legal or other representation with you. It is also very important that you are well prepared to make the most of the mediation as it may be your last opportunity to meet with the other party to try and resolve the matter before litigation.

- Prepare a **short statement** which tells your side of the story – restrict your statement to the key issues, do not get caught up in the minor issues that often arise in disputes.
- Think about **the outcome you would like to achieve** – if you could get the other side to agree to whatever you wanted, what would that be?
- Think about **your bottom line** – what is the limit of what you can really afford to accept?

- Think about different ways of settling the dispute and be ready to discuss them. Can you compromise about accepting or paying an amount of money?
- Think about what the other party may want to achieve and consider your position in relation to that – would you be able to offer part of what they want in order to reach a compromise?
- Consider having a support person to either attend with you, or be available to talk to you by telephone during the mediation.
- Consider having legal or other professional representation – if you believe you will need such representation, make sure you can afford it and if you can, make all the arrangements well in advance so that these representatives can prepare and make themselves available for the mediation. Please note that there is no requirement for you to be represented – you make the decision.
- If you believe you might have some language difficulties, please contact the Office of the Victorian Small Business Commissioner and ask for an interpreter to be provided at the mediation. The Office will provide this service free of charge.
- No matter how convinced you are as to the strength of your position, be prepared to accept there may be potential weaknesses in your case – even if your case looks to you as very strong, nobody has an entirely bullet-proof case.
- Come to the mediation in good faith - be prepared to listen to the other party's version of events with an open mind and be prepared to compromise.
- While the average length of mediation is around 3.5 hours, it may sometimes take longer. Please take this into consideration when making your plans for the day and, if you travel by car, be sure to make appropriate parking arrangements.
- If you have any documents in addition to the ones already provided to our Office and you plan to refer to those during the mediation, please make sure to either send them to the mediator or have them available on the day of the mediation. If you need to clarify any issues about the delivery of the documents, please feel free to contact the mediator using the contact information provided in the invitation.
- If the dispute is resolved, be prepared to sign a written settlement agreement at the end of the mediation.
- You will have to pay the mediation fee before the commencement of the mediation. The amount of the fee and the payment instructions will be advised in the mediation invitation you will receive.

Cancellation / Rescheduling Fee

If the mediation session is cancelled or rescheduled on the request of the parties in less than five working days before the mediation, the party requesting the cancellation or reschedule will have to pay the mediator the late cancellation fee which is equivalent to the full fee for that mediation session - \$900. If the request comes from both parties, they will share the cost of the late cancellation. The Office does not encourage rescheduling of mediations and requires serious reasons to do so. In any event, no more than one rescheduling per party is allowed.

What to expect on the day

- **Introductions** - For mediations held at the Office of the Victorian Small Business Commissioner, when you arrive at the venue, you will be welcomed by a staff member who will place the parties in the appropriate rooms and ask them to sign the Mediation Agreement. You will be also provided with a client satisfaction survey form which you will need to fill in and return after the mediation session is completed. (If the mediation is held at another venue, the first point of contact for the parties is the mediator).

A copy of the signed Mediation Agreement is provided to all parties for their records. The mediator will

then formally introduce himself/herself and invite the parties into the main mediation room where he/she will explain the mediation process. At this point, the mediator will have to establish and be satisfied that each party attends the mediation in person or is represented by a person with comprehensive knowledge of the dispute, who is authorised to make decisions and has authority to enter into a settlement agreement on the day of the mediation.

- **Parties' Presentations** – The mediator will then ask each party to present their case and describe the issues in their own words. The mediator will have read the file in your matter prior to the mediation. However, it is very important that each party presents their side of the story at the beginning of the mediation as there is always a possibility that the paperwork on the file does not cover all the issues involved.
- **Discussion** - Once each side has had the opportunity to speak and be heard by all of the parties, there will be an open discussion of all the issues raised. The mediator will then help the parties to both identify the key issues in dispute and consider possible outcomes.
- **Private Sessions** - Following the open discussion of the issues, the mediator may have private sessions with each party to consider options and possible ways of reaching some agreement. It is very important to remember that the mediator helps the parties to think about their options, but does not provide legal advice or make any decisions. All the decisions are made by the parties themselves. Anything said to the mediator in those private sessions is confidential.
- **Outcomes** - After the private sessions, everyone will meet together again to finalise the mediation, either by reaching a settlement agreement or by confirming that agreement cannot be reached.

What happens if agreement is reached

If agreement is reached, a 'terms of settlement' document is drafted, considered and signed by the parties. This is the end of the mediation process. The parties will then leave the mediation venue and are expected to comply with the terms of settlement. It is important to know that the signed terms of settlement agreement is a binding document and can be enforced by judicial or tribunal proceedings if necessary.

It should be noted that under the *Farm Debt Mediation Act 2011*, a creditor is entitled to apply for an Exemption Certificate (which enables the creditor to commence enforcement action) where mediation has achieved a resolution of the dispute. The creditor would normally seek such a certificate on the grounds that satisfactory mediation had occurred as evidenced by the signed terms of settlement. It is the responsibility of the Commissioner to determine if those grounds have been satisfied. This entitlement is not voided by any of the settlement terms. However, the terms of settlement remain a binding contract between the parties. Some creditors may seek an Exemption Certificate only if the terms of settlement have been breached by the farmer. On application for a certificate by any party (whether the creditor is applying for an Exemption Certificate or the farmer is applying for a Prohibition Certificate), the Commissioner will inform the other party and seek their comment. It is up to the Commissioner to then determine whether or not to issue a certificate based on the requirements of the *Farm Debt Mediation Act 2011*.

The parties are not obliged to reach an agreement with the other party at the mediation. They should only enter into a settlement agreement if they feel that the outcome reached is their best option in the particular circumstances.

What happens if agreement is not reached

If the mediation was conducted under the *Retail Leases Act 2003* or under the *Owner Drivers and Forestry Contractors Act 2005*, the parties may wish to commence proceedings at the Victorian Civil and Administrative Tribunal (VCAT). In order to do that, they will need to request and obtain a certificate signed by the Small Business Commissioner. The certificate is not issued automatically following mediations where settlement is not reached. It is only issued on request from the parties. Either party to the dispute may request a certificate be issued. A copy of the certificate will be forwarded to the other party and to VCAT. Please note that the proceedings at VCAT will not commence until the party formally submits an application to VCAT with the certificate attached.

If the mediation was conducted under the *Small Business Commissioner Act 2003*, the Commissioner can issue a certificate confirming that alternative dispute resolution has been attempted by the parties but the dispute has not settled. This certificate can be used as evidence in proceedings before a Court or VCAT.

If the mediation was conducted under the *Farm Debt Mediation Act 2011*, a creditor may apply for an Exemption Certificate to commence debt recovery proceedings if it considers satisfactory mediation has occurred. Satisfactory mediation under the Act means that the mediation has achieved a resolution of the dispute, or that the mediation has proceeded as far as it reasonably can but has failed to resolve the dispute. Alternatively, if the farmer considers that the creditor has failed to take part in mediation in good faith, the farmer may request a Prohibition Certificate, preventing the creditor from taking enforcement action for up to six months, or until mediation is entered into. On application for a certificate by any party (whether the creditor is applying for an Exemption Certificate or the farmer is applying for a Prohibition Certificate), the Commissioner will inform the other party and seek their comment. It is up to the Commissioner to then determine whether or not to issue a certificate based on the requirements of the *Farm Debt Mediation Act 2011*.

Can a mediation be adjourned

There are situations when the mediation cannot be finalised on the day due to different reasons. If the mediator believes that there is a need for the mediation to be adjourned, he will advise the parties of this and get their agreement to the adjournment. The mediation may be adjourned for a “telephone mention” in which case, the mediator will be in contact with the parties over the phone or e-mail in a further attempt to resolve the dispute. In some cases, there may be a need for an additional mediation session. If so, this will be arranged by the Office of the Victorian Small Business Commissioner following the same procedure as for the first mediation session.

Client Satisfaction Survey Form

After finishing the mediation session, the parties are requested to fill in and submit the forms they were given at the beginning of the mediation. Your feedback about the mediation services provided is always appreciated and is very important to the Office as it assists us to continually improve our service.