



Victorian
**Small Business
Commissioner**

Resolving business disputes

Annual Report 2014-15



VICTORIAN SMALL BUSINESS COMMISSIONER
September 2015
Annual Report 2014-15

Ordered to be printed
Victorian Government Printer
PP No 78, Session 2014-15

This report is available at vsbc.vic.gov.au

© State of Victoria 2015.

This publication is copyright. No part may be reproduced by any process except in accordance with the provisions of the *Copyright Act 1986*.

AUTHORISED BY THE VICTORIAN SMALL BUSINESS
COMMISSIONER

Level 2
121 Exhibition Street
Melbourne Victoria 3000

Telephone: 13 87 22
Toll Free: 1800 136 034
Facsimile: 03 9651 9943
Email: enquiries@vsbc.vic.gov.au
Website: vsbc.vic.gov.au

ISSN 1832-2018



Victorian Small Business Commissioner

The Hon Philip Dalidakis
Minister for Small Business, Innovation and Trade
Level 16
121 Exhibition Street
Melbourne VIC 3000

1

Dear Minister

Annual Report 2014-15

I am pleased to present to you the Annual Report on the operations of the Victorian Small Business Commissioner, covering the period 1 July 2014 to 30 June 2015.

The Report is provided to you under section 14(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 section 14(2) of the Act.

Yours sincerely

Geoff Browne

Victorian Small Business Commissioner

CONTENTS

2

1	Overview of 2014-15	3
2	Our Services	5
3	Informing Victorian Businesses	8
4	Performance 2014-15	11
5	Small Business Commissioner Act 2003	15
6	Retail Leases Act 2003	20
7	Farm Debt Mediation Act 2011	23
8	Owner Drivers and Forestry Contractors Act 2005	25
9	Transport (Compliance And Miscellaneous) Act 1983	26
10	Statement of Expectations	27
11	National Issues	29
12	Mediation Policy and Practices	30
13	Building a Sustainable Organisation	37
14	Organisational Arrangements	38
15	Financial Statements	40

CHAPTER 1

OVERVIEW OF 2014-15

GEOFF BROWNE VICTORIAN SMALL BUSINESS COMMISSIONER

The first full year of amendments to the *Small Business Commissioner Act 2003* (SBC Act) has seen significant growth in demand for Victorian Small Business Commissioner (VSBC) services, with total application volumes increasing by over seven per cent.

For disputes arising under the SBC Act, the amendments enable the VSBC to name a party in the Annual Report if the VSBC determines that the party has 'unreasonably refused' to engage in alternative dispute resolution (ADR). As detailed in Chapter 4, the proportion of applications where the respondent party has refused to engage with the VSBC has fallen from 14.9 per cent in 2013-14 to 5.2 per cent in 2014-15. Settlement rates for the increased volume of matters proceeding to ADR, whether prior to mediation or at mediation, remained high.

Unfortunately, some businesses did refuse to engage, unreasonably, with the VSBC. Eight 'unreasonable refusal' certificates were issued during the year, as documented in Chapter 5.

The amendments provide the ability for the VSBC to seek an Advisory Opinion from the Victorian Civil and Administrative Tribunal (VCAT) where in the public interest to do so.

Following an application by the VSBC in May 2014, on 1 May 2015, Justice Garde, the President of the VCAT handed down an Advisory Opinion on questions relating to whether a landlord could pass onto tenants the costs or obligations for compliance with Essential Safety Measures under the *Building Act 1993*, or the costs of repairs and maintenance under the *Retail Leases Act 2003*. The Advisory Opinion was the first of its kind in Victoria and only the second in Australia.

The application to VCAT seeking the Advisory Opinion reflected the prevailing legal uncertainty as to whether such costs could be passed onto a tenant, and the disputes arising as a consequence. The Advisory Opinion is discussed in detail in Chapter 6.

In December 2014, the VSBC launched its redeveloped website, following review of user requirements and expectations. Visits to the website in the second half of the year were four per cent higher than in the same period last year, with visits in the fourth quarter 16 per cent higher than the third quarter. More than one third of applicants heard about VSBC services via the website.

During the second half of the year, ongoing consultation with the Department of Economic Development, Jobs, Transport and Resources (Department) occurred to progress the Government's election commitments to establish a Small Business Commission and broaden the functions and powers of the VSBC.

The total number of applications for assistance involving disputes under the SBC Act grew an unprecedented 41 per cent during 2014-15. This increase is likely due to a combination of factors, including the redeveloped website, the 2014 amendments, and increased awareness of VSBC services arising from continuing information and education sessions conducted across Victoria, and through electronic channels.

Total application volumes grew 7.6 per cent in 2014-15. Twenty-four per cent of disputes were settled prior to mediation, and the mediation settlement rate was 81.7 per cent. Overall customer satisfaction with our mediation service was 94.7 per cent.

Three investigations were initiated during the year: concerns regarding representations made and services provided by a Queensland based business offering in-store advertising to local businesses; a water corporation whose infrastructure projects adversely affected local businesses; and a Commonwealth business entity whose contracts for certain services contained questionable dispute resolution processes which, in addition, appeared to be in breach of Victorian law.

Meetings with other State Small Business Commissioners, the Australian Small Business Commissioner and the Deputy Chair of the Australian Competition and Consumer Commission were held quarterly. These provide an excellent opportunity for common issues to be identified and new ways of providing services to be explored.

Nationally, amendments to the Franchising Code of Conduct came into effect. Draft bills for the extension of unfair contract term protections to small businesses, and the establishment of the Australian Small Business and Family Enterprise Ombudsman were distributed for consultation and feedback. Bills for both proposals were subsequently introduced in the Commonwealth Parliament. The education and information program accompanying both of these new proposed Commonwealth laws are likely to lead to increased demand for VSBC dispute resolution services.

I have appreciated the support and assistance of Small Business Ministers during the year: the Hon. Russell Northe MP and the Hon. Adem Somyurek MP. The assistance provided by the Department of Economic Development, Jobs, Transport and Resources has also been appreciated.

CHAPTER 2

OUR SERVICES

PURPOSE

The Victorian Small Business Commissioner (VSBC) was established by the *Small Business Commissioner Act 2003* to enhance a competitive and fair operating environment for small business in Victoria. The VSBC has a range of functions under that Act, including dispute prevention and dispute resolution.

The VSBC also has statutory dispute resolution and prevention functions under the *Retail Leases Act 2003* (RL Act), the *Owner Drivers and Forestry Contractors Act 2005* (ODFC Act), the *Farm Debt Mediation Act 2011* (FDM Act) and the *Transport (Compliance and Miscellaneous) Act 1983* (Transport Act).

During 2014-15, the predominant activity of the VSBC was providing a quick, low cost and effective dispute resolution service for business-to-business disputes. The VSBC also deals with disputes between business and local or state government, or with not-for-profit entities.

There is no statutory definition of 'small business' in any legislation administered by the VSBC, and the VSBC accepts disputes from any sized business.

DISPUTE RESOLUTION SERVICES

There are three main elements:

INFORMATION AND EDUCATION

The VSBC provides information to businesses on their rights and obligations under relevant legislation to assist them to prevent and resolve disputes. Information is provided by telephone, email, face-to-face information sessions, printed materials and through the website. In addition, the VSBC and staff regularly meet with stakeholder groups to inform them of the services available through the Office. These services are available at no cost to the parties.

PRELIMINARY ASSISTANCE AND RESOLUTION

When an application for assistance with a dispute under the RL Act, the SBC Act or the ODFC Act is received by the VSBC, staff will initially engage with both parties to see if the dispute can be resolved before proceeding to mediation. Staff expertise in legislative provisions can often assist in bringing the parties to a pragmatic resolution. If the dispute cannot be resolved at this stage, staff will explain the benefits of mediation to the parties and encourage them to participate, avoiding the emotion, delay, cost and distraction of litigation. These services are available at no cost to the parties.

The same process does not apply for disputes under the FDM Act or the Transport Act, where the VSBC role is limited to arranging and conducting mediation.

MEDIATION

The timely, low cost resolution of a dispute through mediation can maintain a business relationship and let the parties quickly get back to business. A binding *Terms of Settlement* between the parties brings clarity and control to resolution of the dispute. Each party to mediation contributes \$195 (\$95 for mediations under the ODFC Act and the Transport Act) toward the cost of the mediation, which is otherwise subsidised by the VSBC. Mediations are held in locations to meet the needs of the parties.

The VSBC cannot offer mediation under the Transport Act (for disputes between contracted drivers and taxi operators) unless the Taxi Services Commission issues a certificate to a disputing party referring the matter to VSBC mediation.

OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION

The SBC Act enables the VSBC to determine what form of alternative dispute resolution is most appropriate to use in dealing with a dispute. Occasionally the VSBC will invite parties to attend a ‘facilitated meeting’ rather than a ‘mediation’. This can be helpful where there is a need for improved communications between the parties managed by an independent third party so the alternative points of view can be expressed and understood. A facilitated meeting may also be more palatable for some parties – for example, participation at a mediation may have to be reported to an offshore Board, whereas attending a facilitated meeting may not. Facilitated meetings may still lead to agreed settlement terms.

DO PARTIES HAVE TO USE THE VSBC SERVICES?

With few exceptions, disputes under the RL Act and the ODFC Act must be referred to the VSBC for attempted dispute resolution before they can progress to litigation at the Victorian Civil and Administrative Tribunal (VCAT) as the relevant jurisdiction. If mediation is unsuccessful, the VSBC can issue a certificate enabling a party to proceed to litigation at VCAT.

While these disputes must be referred to the VSBC, there is no compulsion on a respondent party to participate in mediation with the VSBC. However, if the VSBC certifies that a party has refused to engage in ADR and the matter proceeds to VCAT, VCAT has discretion to award costs against the refusing party.

Where a farmer is in default of a farm debt, the FDM Act requires a creditor to notify the farmer that the farmer has a statutory right to request mediation through the VSBC. However, if the farmer does not exercise that right within 21 days, the creditor may proceed with enforcement action. Where mediation occurs and the VSBC determines that the mediation was ‘satisfactory’, a certificate issued to the creditor enables the creditor to take enforcement action, although compliance with *Terms of Settlement* reached at mediation may forestall such action. There is no compulsion on either party to attend VSBC mediation. However, if a farmer refuses, a certificate enables the creditor to proceed with enforcement action. If a creditor refuses, a certificate prevents the creditor from taking enforcement action for a period of time.

There is no statutory obligation for a dispute under the SBC Act to be brought to the VSBC. Parties can elect to litigate a matter at VCAT or the Courts, as appropriate, without use of VSBC ADR services. There is a certificate function under the SBC Act which enables the VSBC to certify that a party has ‘unreasonably refused’ to engage in ADR with the VSBC, and name that refusing party in the VSBC Annual Report.

Under the Transport Act, if a dispute lodged with the Taxi Services Commission is not resolved and the dispute is amenable to a mediated outcome, the Taxi Services Commission issues a certificate to the parties advising that the dispute may be referred to the VSBC. A party does not have to act on such a certificate, but cannot take the dispute directly to VCAT without first progressing to the VSBC for mediation.

INVESTIGATIONS

The VSBC can undertake investigations under the SBC Act. There are three broad circumstances which may lead to an investigation being initiated:

- > where multiple disputes arise involving the same entity, issue, or conduct;
- > where an issue is brought to the VSBC's attention, not as a dispute but which could lead to disputes; or
- > where an individual dispute highlights an underlying issue of concern beyond that particular dispute.

The VSBC undertakes investigations infrequently as most matters are appropriately addressed through individual dispute resolution.

The initiation of an investigation typically involves writing to the respondent businesses/entities and seeking response to concerns identified by the VSBC.

Based on that response (if any) the VSBC may:

- > seek further information from the respondent/s or other relevant body/ies;
- > notify the entity that it intends to monitor the situation, including raising the issue of concern with other Small Business Commissioners to identify similar conduct in other States;
- > propose a meeting, facilitated meeting or some other form of engagement to progress / address the issue;
- > prepare a report on the issue including relevant findings and recommendations, and seek the respondent/s response; or
- > make representations to a relevant body or person. This may be to the Minister for Small Business, another Minister, an industry association, a regulator, or other relevant body (e.g. Australian Competition and Consumer Commission, other State Commissioners).

OTHER ADMINISTRATIVE FUNCTIONS

The VSBC has a range of administrative functions under the RL Act, including appointing Specialist Retail Valuers and issuing certificates to enable a tenant to waive its statutory right to a minimum five year lease term.

Under the ODFC Act, the VSBC issues certificates on application by a contractor seeking to waive its obligation to provide a minimum period of notice of termination to the hirer.

CHAPTER 3

INFORMING VICTORIAN BUSINESSES

A major focus of the VSBC during the year continued to be informing businesses and their advisers, through multiple channels, of the services provided by the VSBC.

PRESENTATIONS

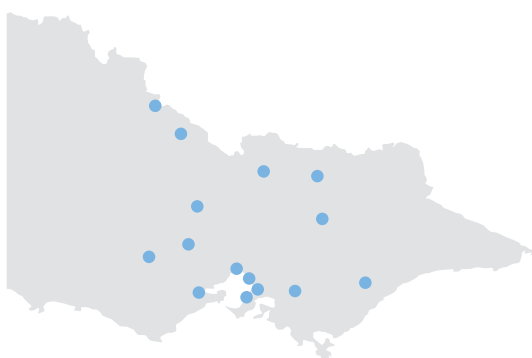
A total of 103 presentations were made by the VSBC during the year, including events for the Small Business Festival in August 2014. These included face to face information sessions, presentations at conferences, and 16 webinars.

Table 3.1 summarises the range of presentations during the year.

TABLE 3.1 PRESENTATIONS 2014-15

Metropolitan Councils	8
Regional Councils/Shires	10
Industry & Trader Associations	15
Accountants / Lawyer groups	12
Conferences	5
Co-working spaces	12
Stakeholder forums	7
Other	8
(Subtotal)	77
Webinars	16
Total	93

FIGURE 3.1 LOCATIONS OF NON-METROPOLITAN PRESENTATIONS 2014-15



The VSBC also attended ten business expos during the year. The VSBC often shares a stand with Small Business Victoria and/or the Small Business Mentoring Service at these and other events.

The presentations cover a range of topics, all with the core content of the services available through the VSBC and highlighting some of the causes of commercial disputes that come to the VSBC's attention:

- > Retail leases – tips and traps
- > Avoiding the costs of litigation
- > Building and maintaining successful business relationships
- > Starting a business – what to look out for

These topics are also offered via webinars, now a regular feature of the VSBC communication program.

ONLINE

The launch of the new VSBC website in November 2014 followed a strategic review of the VSBC's mission, values and goals, a review of the existing website, and a detailed analysis of users.

A key objective was to provide clear and simple explanation of our independent and neutral role and services to the user who may not have heard about the VSBC but is faced with a business dispute and needs assistance.

There was also the additional challenge of catering for our regular website users, so it was important that we were able to strike a balance enabling us to assist all users of the new site.

The resulting website is less legalistic and more accessible than the previous version, speaking to a range of audiences, and uses contemporary design and navigation tools. A responsive design enables it to be accessed from all types of devices.

The website plays a key role in providing information to businesses and their advisers on VSBC services, dealing with disputes, and legislative requirements.

The redeveloped site also enables us to feature much more news and event information for small businesses.

Comparing overall website visits between January – June 2015 against visits between January and June 2014, there was an increase of four per cent, which equates to approximately 1,500 additional visits. Almost two-thirds of this increase can be attributed to the use of search engines. This increase is more prominent in the final quarter of the 2014-15 financial year, with visits from April – June 2015 almost 16 per cent higher than January – March 2015.

Visitors are spending less time on the redeveloped website and are looking at fewer pages, suggesting that visitors are finding the information they are looking for quickly, rather than having to browse around the site to search for information.

USER SURVEY

VSBC application forms ask how the applicant heard about the VSBC. In 2014-15, 758 responses were provided:

TABLE 3.2 HOW DID YOU HEAR ABOUT THE VSBC?

	2013-14	2014-15
Total responses	181	758
	%	%
Website	56.9	33.8
Lawyer	22.8	33.9
Industry Association	8.4	8.3
Accountant	-	1.8
Radio	1.8	0.3
Print media	0.6	0.4
Presentation by VSBC	-	1.8
Other	9.6	19.7

The strong growth in referrals coming from lawyers is a positive indication that the mediation services of the VSBC are well-regarded by the legal profession.

An increase in referrals arising from presentations given by the VSBC, and from accountants, reflects the number of speaking engagements through the year, and the particular focus on accountants in 2014-15.

The doubling of referrals from 'other' sources includes family, friends and colleagues, existing knowledge, and from VCAT.

TELEPHONE

The 13 VSBC (13 8722) number is a major information channel for the VSBC. Calls to the VSBC during the year increased 5.7 per cent to 10,980.

INFORMATION SHEETS AND GUIDELINES

A range of documents can be downloaded from the website. These include Information Sheets on various aspects of the *Retail Leases Act 2003*, such as Rent Reviews, Outgoings (including the Fire Services Levy), Assigning or Transferring a Retail Lease, Security Deposits and Key Money, as well as the Information Brochure required by law to be provided by a landlord to a prospective tenant prior to a lease being entered into. More detailed Guidelines on the website cover *What are Retail Premises?* and *Current Market Rent and Engaging Specialist Retail Valuers*.

Simplified Chinese, Vietnamese and Arabic translations of a number of documents, including the statutory Information Brochure, were provided on the website during the year.

Guidelines on what factors the VSBC takes into account in determining if a business has unreasonably refused to engage in ADR under the SBC Act are also published on the website.

ARTICLES

A number of articles were prepared for newsletters and magazines, including a series on franchising for Franchise Business Magazine and the Australia Women's Business Network.

ENEWSLETTER

A new eNewsletter was launched in June 2015. It is intended to provide 4 – 6 such publications per annum, to subscribers.

SOCIAL MEDIA

The VSBC established a LinkedIn account during the course of the year, as an initial entry into social media.

BROCHURES

A set of brochures profiling VSBC services is available for downloading from the website as well as in hard copy. This information is in high demand at business expos and other major events which can involve hundreds of businesses.

MULTICULTURAL ENGAGEMENT

A Mandarin-speaking VSBC staff member presented to more than forty recently arrived Chinese business migrants, via the Adult Migrant Education Service, on VSBC services and tips and traps in buying a business or entering into contracts.

The website also includes summary information and translations of key documents in Simplified Chinese, Vietnamese and Arabic.

CHAPTER 4

PERFORMANCE 2014-15

NUMBER OF APPLICATIONS

The total number of applications in 2014-15 grew 7.6 per cent from 2013-14 levels. The Office received 1,841 applications in 2014-15 compared to 1,711 applications in 2013-14.

The number of retail lease applications grew 5.9 per cent in the year, reversing a decline in volumes in the previous two years. Retail lease applications comprised 58 per cent of total applications received.

The number of general commercial disputes lodged under the *Small Business Commissioner Act 2003* (SBC Act) increased by 41.4 per cent, exceeding the 28 per cent growth the previous year. The total number of these applications was 560, the highest annual volume on record.

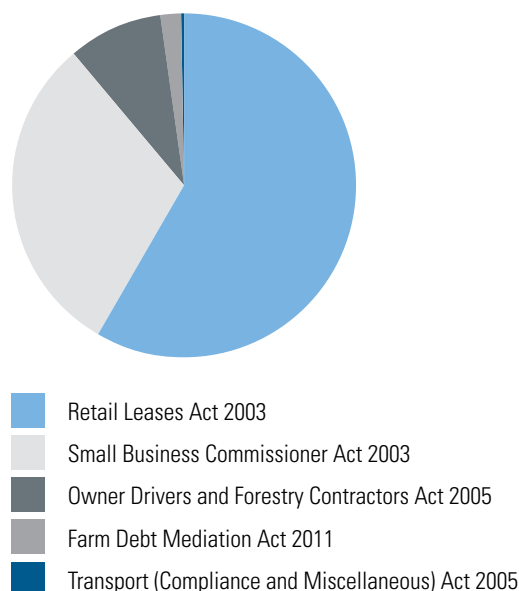
The number of owner driver disputes fell 22.2 per cent to 35 applications, and the number of applications received under the *Farm Debt Mediation Act 2011* fell 33.6 per cent to 168.

Only one taxi dispute application was received under the *Transport (Compliance and Miscellaneous) Act 1983* during the year.

TABLE 4.1 APPLICATIONS RECEIVED 2014-15

	2013-14	2014-15	Increase (decrease)	%
Total	1711	1841	7.6	
Retail Leases Act 2003	1017	1077	5.9	
Small Business Commissioner Act 2003	396	560	41.4	
Owner Drivers and Forestry Contractors Act 2005	45	35	(22.2)	
Farm Debt Mediation Act 2011	253	168	(33.6)	
Transport (Compliance and Miscellaneous) Act 1983	n.a.	1	n.a.	

FIGURE 4.1 APPLICATIONS RECEIVED BY JURISDICTION



PROFILE OF APPLICANTS

VSBC application forms ask applicants to indicate the number of employees in their business. Not all applicants provide this information. In 2014-15, 830 responses were provided.

The data shows little change from 2013-14, as shown in Table 4.2.

No data is collected on the number of employees in the respondent's business.

TABLE 4.2 PROFILE OF APPLICANT BY NUMBER OF EMPLOYEES

	2013-14	2014-15
Responses	181	830
	%	%
0 employees	19.9	22.2
1-4 employees	50.8	51.2
5-19 employees	22.7	20.0
20+ employees	6.7	6.7

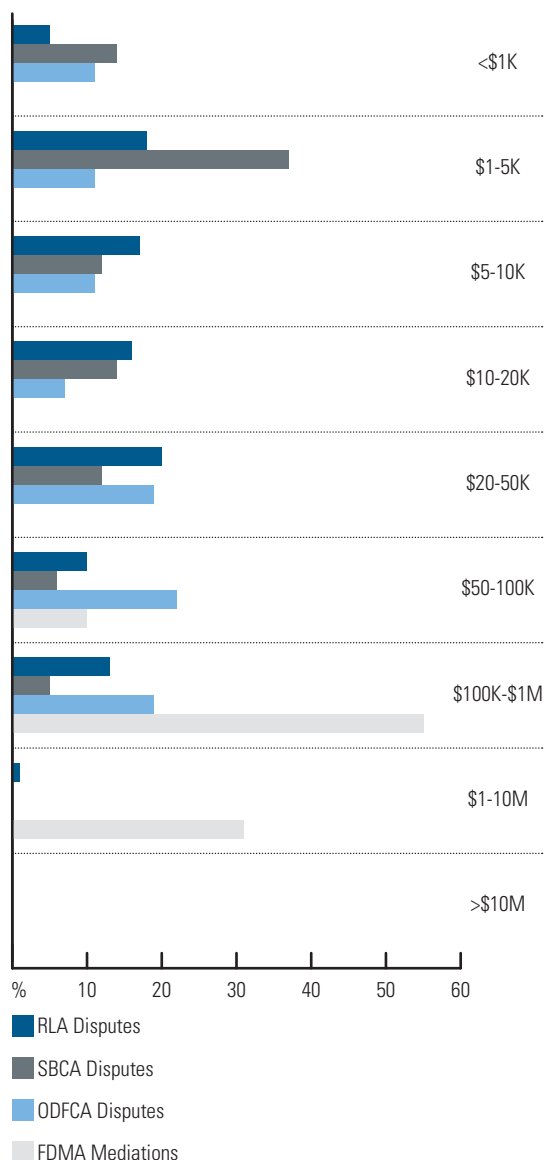
AMOUNT IN DISPUTE

Application forms enable the applicant to specify the amount in dispute, although such information is not mandatory, and sometimes the dispute is not related to an amount of money.

The profile of disputes by amount claimed and legislation is shown below.

FIGURE 4.2 PROFILE OF DISPUTE AMOUNTS BY LEGISLATION 2014-15

CLAIMED VALUE OF DISPUTES – DISTRIBUTION



Two dispute applications lodged claimed the amount in dispute exceeded \$10 million. Table 4.3 shows the median and average dispute amounts by jurisdiction excluding these two applications.

TABLE 4.3 AMOUNT IN DISPUTE SUMMARY

Excluding >\$10,000,000	Median \$	Average \$
RLA Disputes	16,559.63	80,626.25
SBCA Disputes	4,500.00	36,434.31
ODFCA Disputes	41,466.68	55,715
FDMA Mediations	607,053.41	970,164.19
Taxi Disputes	3,250.00	3,250.00

DISPUTE RESOLUTION SUCCESS RATES

Between 1 July 2014 and 30 June 2015, 1,203 matters were completed through the VSBC's dispute resolution process. A number of matters still in process were incomplete as at 30 June 2015.

The table below outlines the outcomes for completed matters. Completed matters include those matters where resolution is not achieved and the file is closed. Pre-mediation dispute resolution remains a focus of the office, with 24.3 per cent of matters resolved in this way.

TABLE 4.4 DISPUTE APPLICATION OUTCOMES

	2014-15	%
Total completed disputes		
Disputes completed before mediation	499	41.5
Settled prior to mediation	292	24.3
No mediation /refusals	207	17.2
Disputes completed through mediation	704	58.5
Successful mediation	575	47.8
Unsuccessful mediation	129	10.7

Of the disputes which were referred to mediation, 81.7 per cent were successfully resolved. The settlement rate varies from 78.5 per cent to 95.5 per cent across jurisdictions. Thirteen per cent of mediations were conducted in regional Victoria.

TABLE 4.5 MEDIATION OUTCOMES BY VENUE AND JURISDICTION

Mediations held	Venue			Completed Mediations				Adjourned @ 30/6/15		
	VSBC	Other Metro	Regional	Total	Successful	Un-successful	Success rate			
Total	100%	789	679	8	102	704	575	129	81.7%	85
RLA	70.5%	556	504	3	49	494	388	106	78.5%	62
SBCA	16.2%	128	116	2	10	116	99	17	85.3%	12
FDMA	9.5%	75	29	3	43	66	63	3	95.5%	9
ODFCA	3.8%	30	30	-	-	28	25	3	89.3%	2

RLA – Retail Lease Act 2003

SBCA – Small Business Commissioner Act 2003

FDMA – Farm Debt Mediation Act 2011

ODFCA – Owner Drivers and Forestry Contractors Act 2005

From 1 January 2015, matters adjourned at mediation are routinely followed up after two months (if no outcome is notified by the mediator prior). If there is no outcome at that stage, the mediation is recorded as not settled. This has resulted in the proportion of mediations adjourned as at 30 June falling from 12.6 per cent in 2013-14 to 10.8 per cent in 2014-15. A consequence of this tightened approach is that mediation settlement rates may be slightly understated to the extent that matters may achieve settlement beyond the two month point.

NO MEDIATION / REFUSALS

The category 'No mediation / refusals' comprises three elements:

- > the respondent refuses to engage with the VSBC;
- > the VSBC is unable to find or make contact with the respondent; or
- > the matter does not settle prior to mediation, but the amount in dispute does not warrant mediation.

Amendments to the SBC Act in May 2014 enabled the VSBC to name a party in the Annual Report if the party 'unreasonably refused' to engage in alternative dispute resolution with the VSBC. This has led to a reduction in the refusal rate by nearly two-thirds.

TABLE 4.6 RESPONDENT REFUSAL – SBC ACT

As a % of completed dispute applications		
	2013-14	2014-15
SBC Act	14.9%	5.2%

Not all refusals are determined to be 'unreasonable'. Further comments on 'unreasonable refusal' and the names of parties issued 'unreasonable refusal' certificates during the year are provided in Chapter 5.

The proportion of completed disputes under the SBC Act where the respondent was unable to be contacted also declined, from 9.4 per cent to 4.9 per cent, which is similar to the 'unable to locate' category for disputes under the RL Act.

PRELIMINARY ASSISTANCE – PHONE ENQUIRIES

A significant element of the VSBC work involves taking calls from small business and providing assistance on issues. The majority of queries relate to rights and obligations under retail leases, with a further significant proportion involving disputes which arise between businesses more generally.

The Business Victoria Contact Centre was once again the first point of contact for phone enquiries, with only a limited number of calls requiring higher level of expertise transferred to the VSBC's dispute management officers.

TABLE 4.7 PRELIMINARY ASSISTANCE – PHONE ENQUIRIES

	2013-14	2014-15	Change
Total	10,387	10,980	5.7%

CHAPTER 5

SMALL BUSINESS COMMISSIONER ACT 2003

TYPES OF DISPUTES

Disputes handled under the *Small Business Commissioner Act 2003* (SBC Act) are those commercial disputes which do not fall within the ambit of statutory dispute resolution functions under the *Retail Leases Act 2003*, *Owner Drivers and Forestry Contractors Act 2005*, *Farm Debt Mediation Act 2011* and the *Transport (Compliance And Miscellaneous) Act 1983*.

This includes disputes relating to franchising, supply chain, buying a business, non-retail leases, payment disputes, distribution agreements, and general commercial contracts for the provision of goods or services.

The SBC Act makes clear that the VSBC has express jurisdiction to deal with a broad range of commercial disputes as well as unfair market practices.

Commercial disputes may be between businesses and other businesses, local or state government bodies, or not-for-profit entities.

The number of applications for assistance with such disputes has risen significantly in the past two years, with growth of 41 per cent in 2014-15 exceeding the 28 per cent growth the previous year. A combination of factors is likely to be behind such strong growth rates, including an increased awareness of the broad scope of the VSBC jurisdiction, particularly by lawyers, accountants, and industry associations who in earlier years may have associated the VSBC role primarily with retail lease disputes.

During 2014-15, the VSBC received 560 applications under the SBC Act. The number of applications under the SBC Act as a proportion of total applications received by the VSBC increased from 23.2 per cent to 30.4 per cent.

Forty per cent of matters lodged with the VSBC were settled without the need for mediation. This compares with 30 per cent last year.

The settlement rate for mediated disputes was 85.3 per cent.

During the year, further information was provided to the Commonwealth Government regarding the proposal to extend consumer unfair contract term protections to small business. A review of VSBC applications under the SBC Act identified 9.6 per cent of disputes where the issue involved the terms of the contract – terms which, if in consumer contracts, would likely be determined unfair and therefore void.

The type of disputes under the SBC Act and the amount in dispute vary considerably, from small amounts (under \$1,000) relating to non-payment of invoices, to failure to supply services despite monthly direct debits of hundreds or thousands of dollars, to multi-million dollar credit facilities refused due to court action by a third party.

CASE STUDY

A small business was in dispute with a Government department over the provision of its services. The business had invoiced the department for work provided, however, the department refused to pay, as it was not satisfied with the service provided.

The business lodged an application with the VSBC under the SBC Act, and requested low cost mediation to seek to resolve the matter.

The department engaged lawyers to respond to the VSBC. The lawyers submitted the VSBC should refuse to deal with the case as the parties should comply with the dispute resolution procedure agreed to in the written contract. In the alternative, the respondent agreed to VSBC mediation.

The business sought VSBC mediation instead because the contractual process was expensive and time consuming. The business wanted to resolve the dispute quickly, pragmatically and at low cost.

The VSBC organised mediation and the parties reached a commercial settlement.

The case demonstrates the importance of a pre-agreed dispute resolution procedure that is fair to both parties to a contract.

Certificates can also be issued where a dispute has not been resolved at mediation, or where alternative dispute resolution is unlikely to resolve the dispute. Details of these certificates are not subject to publication in the Annual Report.

To assist parties, the VSBC prepared *Unreasonable Refusal Guidelines*, which are available at vsbc.vic.gov.au, and are included with letters sent to respondent parties to disputes.

As noted in Chapter 4, the refusal rate for such disputes decreased (as a percentage of completed disputes) by nearly two-thirds. Importantly, with the increased engagement, resolution rates have remained high.

UNREASONABLE REFUSAL CERTIFICATES ISSUED

The VSBC makes every effort to engage with respondent parties, explaining the benefits of resolving disputes through alternative dispute resolution, and explaining the consequences if their refusal is determined to be unreasonable.

During 2014-15, the VSBC determined that eight parties had unreasonably refused to engage in alternative dispute resolution with the Office, and issued certificates, as shown in Table 5.1.

UNREASONABLE REFUSAL

Amendments to the SBC Act in May 2014 introduced the ability for the VSBC to issue certificates if a party 'unreasonably refuses' to engage in alternative dispute resolution. This certificate can be presented as evidence to a Court or Tribunal. The amendments also enable the VSBC to publish in its Annual Report the name of parties issued such certificates.

TABLE 5.1: PARTY TO A DISPUTE UNREASONABLY REFUSING TO PARTICIPATE IN ADR.

Certificate Date	Party
22 July 2014	Diesel Developments Pty Ltd
25 July 2014	The party with the registered business name Dynogrind
22 August 2014	The party with the registered business name Home Style Foods
3 September 2014	Transdirect Pty Ltd
13 October 2014	Showtime Digital Marketing Pty Ltd
28 October 2014	Pro Image Plaster Pty Ltd
14 April 2015	The party with the registered business name BTP Communications
23 April 2015	Northbridge Z Pty Ltd.

CASE STUDY

The importance of the prospect of an unreasonable refusal certificate to encourage parties to engage in alternative dispute resolution is evidenced in the following case study.

A small business complained to the VSBC about its commercial dealings with another business. The respondent advertises details of businesses in its hard copy and online directory.

The Applicant paid an initial deposit to advertise its business with the Respondent. The Applicant disputed the draft proof of the advertisement provided by the Respondent and sought to terminate the written contract between the parties. The Applicant sought return of the deposit.

The VSBC wrote to the Respondent and sought a response in 21 days.

The Respondent did not respond at all to the VSBC.

The VSBC wrote to the Respondent again with its intent to issue an unreasonable refusal certificate. As a consequence, the Respondent engaged with the VSBC and agreed to mediate.

While the Applicant sought return of its deposit, the Respondent sought payment for breach of contract for the duration of the contract, being some thousands of dollars. The parties reached a commercial agreement, with the Applicant agreeing to forego its deposit in return for the Respondent foregoing any additional compensation.

INVESTIGATIONS

Queensland-based in-site advertising business

During 2014-15, the VSBC received six dispute applications against this business, following on from four in the previous year. In total, the VSBC has received 33 complaints against this business in recent years.

The business offers to promote customers' businesses on screens located in a variety of stores in the locality of the customer, including fast food outlets, dental and medical centres, and hardware stores.

The basis of the complaints lodged include:

- > misrepresentations of advertising services being available at designated stores
- > failure to provide contracted services
- > commencement of direct debit charges prior to services being provided
- > advertisements being run without final approval by the customer
- > failure to rectify notified errors in advertisements prior to screening

The contracts also contain terms which, if in consumer contracts, would likely be considered unfair and therefore void.

The volume of disputes lodged against this business with the VSBC is unprecedented. The VSBC also sought information from other Small Business Commissioners, which confirmed that complaints were not limited to Victoria.

In May 2015, the VSBC notified the business that it had commenced an investigation into its practices. The VSBC raised a series of questions about the operations of the business and sought documentation on internal complaint handling processes, numbers of complaints received, training practices and scripts used by salespeople.

A comprehensive response and supporting documentation was provided in late June. As at 30 June 2015 analysis of this information was continuing.

Water Corporation infrastructure project

The VSBC received representations from a number of small businesses concerned about the processes and consequences arising from a major infrastructure project by this organisation. The local businesses were concerned that no consideration appeared to have been given to the impact on local businesses when options to deliver the infrastructure project were assessed, and that few proactive steps had been taken by the organisation, in consultation with the local council, to attempt to mitigate the impacts of the project on local businesses prior to the commencement of the project or subsequent to the commencement of the project.

A range of questions were put to the organization by the VSBC, and responses provided. Clarification of a number of points has since been sought.

While this investigation was triggered by a specific project, it raises broader questions about the extent to which such organisations do or should take into account the impacts of infrastructure works on local businesses, particularly when the project duration is long.

Commonwealth entity's contract terms

This investigation arose from a specific dispute between a small business contractor and this Commonwealth entity. While the specific dispute proceeded to mediation at the VSBC and was settled, the standard form contract at the centre of the dispute raised two significant concerns for the VSBC.

Firstly, the dispute resolution provisions in the contract specified that if the matter progressed to arbitration, the Commonwealth entity was not bound by the arbitrator's decision unless it consented to it. Secondly, the relationship seemed to come under the jurisdiction of the *Owner Drivers and Forestry Contractors Act 2005* (Vic), in which case the dispute resolution provisions of the contract should be governed by those in this Act – which requires such disputes to proceed to the VSBC for resolution.

These issues of concern were put to the Commonwealth entity. No response had been received by 30 June 2015.

Petrol drive-offs

This investigation commenced in 2013-14 and continued in 2014-15. The VSBC received a number of representations from industry associations, franchisees, and independent service station operators concerned about the increasing incidence of 'petrol drive-offs' – drivers filling their vehicle with fuel and leaving the service station without paying.

To assist the VSBC gain a better understanding of the issue, and to act as an independent third party to enable a range of industry participants to clarify and consolidate their concerns and suggested approaches, the VSBC organized a facilitated meeting in September 2014. The meeting resulted in an agreed and consistent approach across industry participants.

Coverall

In July 2014, the Australian Competition and Consumer Commission (ACCC) instituted proceedings against a franchisor, Coverall Cleaning Concepts South East Melbourne Pty Ltd, alleging it engaged in unconscionable conduct in contravention of the Australian Consumer law.

The matter was originally referred to the ACCC by the VSBC following an investigation into multiple dispute applications against the franchisor.

In March 2015, the Federal Court ordered a significant \$500,000 penalty against the cleaning franchise.

The case demonstrates a constructive working relationship between the VSBC and other agencies, such as the ACCC.

CHAPTER 6

RETAIL LEASES ACT 2003

20

During 2014-15, a total of 1,077 applications were received under the *Retail Leases Act 2003* (RL Act) compared with 1,017 applications in 2013-14.

This 5.9 per cent increase in applications contrasts with declines in application volumes in the previous two years.

Twenty per cent of retail lease disputes were settled by VSBC staff prior to mediation and the settlement rate for those matters progressing to mediation was 78.5 per cent. The VSBC conducted 8.8 per cent of RL Act mediations in regional Victoria.

The top causes of retail lease disputes relate to:

- > tenant owing money;
- > security deposits;
- > repairs and maintenance;
- > amounts payable;
- > early termination of lease;
- > make good at lease end;
- > options and renewals; and
- > assignments.

A range of guidelines and information sheets were produced or updated during the year to inform tenants and landlords of their rights and obligations under the RL Act. These included:

- > guidelines on *What are Retail Premises?* were revised and published on the website;
- > information sheets on Rent Reviews, Key-Money and Outgoings including the Fire Services Levy were published on the website;
- > information sessions both in English and Mandarin were conducted by the VSBC focussing on the causes of retail tenancy disputes;
- > presentations were made at seminars for solicitors and real estate agents in support of continuing professional development requirements; and

- > video presentations were prepared for inclusion on the website covering Repairs and Maintenance, Outgoings and Assigning a Retail Premises Lease.

As part of the webinars program introduced during the year, a number of webinars on Retail Leases – Tips and Traps were also conducted.

CASE STUDY EXERCISING AN OPTION

A dispute occurred between the former landlord and tenant at a retail premises.

The tenant made an application for mediation because it claimed that the landlord was unreasonably pursuing leasing costs long after the tenant had vacated the premises. The landlord responded that the tenant had validly exercised their option at the retail premises for a further year, and that the tenant had left in the middle of this term without an agreed termination of the lease.

The tenant claimed that an employee at their company who had exercised the option did not have the authority to do so. It was further advised that there were verbal discussions between the parties about transferring the lease within the year, but that these conversations were never put in writing.

Through preliminary assistance provided by the VSBC, the parties saw the benefit in negotiating a commercial agreement so that they could draw a line in the sand. The parties agreed that the landlord would use the tenant's security deposit to account for three months' rent, and that the tenant would make a further payment of \$5,000 within seven days to the landlord.

Both parties were happy with the outcome as they both felt that their needs had been acknowledged and that they had come to a mutually beneficial agreement.

ADVISORY OPINION – ESSENTIAL SAFETY MEASURES AND REPAIRS AND MAINTENANCE

In May 2014, amendments to the *Small Business Commissioner Act 2003* gave new powers to the VSBC to refer a matter to the Victorian Civil and Administrative Tribunal (VCAT) for an Advisory Opinion, including matters relating to the performance of his or her functions or the exercise of powers under any Act, where in the public interest to do so.

Following these amendments, the Office made an application to VCAT for an Advisory Opinion on the question of whether a landlord of commercial premises can require as part of a commercial lease a business tenant to meet the landlord's obligations for Essential Safety Measures under the *Building Act 1993*, or to pay as outgoings, the costs of compliance with those obligations.

The Advisory Opinion also sought clarification of landlord and tenant obligations for repairs and maintenance in retail premises. In particular, whether a landlord of retail premises can pass on the costs of compliance with section 52 (repairs and maintenance) of the RL Act to a tenant.

The application for the Advisory Opinion was made following ongoing legal debate on these rights and obligations.

At the direction of VCAT, notification of the application was published by the VSBC in daily newspapers, and letters were sent to key stakeholders notifying them of the application, and seeking formal submissions.

Following a hearing in February 2015 where submissions were made by the VSBC, the Shopping Centre Council of Australia and the Real Estate Institute of Victoria, the Advisory Opinion was handed down on 1 May 2015 by VCAT President the Hon. Greg Garde AO RFD.

The Advisory Opinion found that:

- > a landlord cannot pass onto a tenant a landlord's direct obligations to comply with Essential Safety Measures, or the costs of compliance;
- > where a landlord may ensure that compliance with Essential Safety Measures are undertaken by the tenant by way of lease terms, the cost of compliance is at the landlord's expense; and
- > a landlord cannot pass onto a tenant in retail premises the costs of complying with repair and maintenance obligations under section 52 of the RL Act.

Copies of the Opinion and all submissions and other documents are available at vsbc.vic.gov.au.

MINISTERIAL DETERMINATIONS

Under Section 5 of the RL Act, the Minister may make Determinations excluding the application of the Act in respect to certain retail premises leases.

On 1 January 2015, a new 'Community and Charitable Purposes' Determination was introduced, replacing the previous 'Council Owned Premises used for Community and Charitable Purposes' Determination. The new Determination broadened the scope of the previous Determination by not limiting premises to Council-owned premises. It also introduced a maximum annual rental of \$10,000 for such Determination to apply.

As at 30 June 2015, there are six Ministerial Determinations made and published in the Victorian Government Gazette. The Determinations exclude from the Act:

- > leases of certain retail premises in multi-story buildings;
- > Barrister's Chambers Limited premises;

- > leases of fifteen years duration or longer with substantial expenditure obligations on the tenant and a significant disentitlement of the tenant to remove such improvements;
- > Melbourne Market Authority leases;
- > premises that are leased for certain community or charitable purposes; and
- > leases where the tenant is a body corporate (or a subsidiary of a body corporate) whose securities are listed on the New Zealand Stock Exchange Limited.

Full details of the Ministerial Determinations are available on the VSBC website at vsbc.vic.gov.au

During the year, the VSBC was advised that the New York Stock Exchange was no longer a member of the World Federation of Exchanges. Section 4(d)(i) exempts from the RL Act a body corporate whose securities are listed on a stock exchange that is a member of this Federation. The VSBC has proposed that a further Determination be made to address this situation, as applies for the New Zealand Stock Exchange.

SECTION 21 CERTIFICATES

Section 21 of the RL Act provides that the term of a retail lease (including options) must be at least five years, and any initial lease term exceeding 12 months but less than five years is extended by the RL Act to a five year term. A tenant may waive its right to a five year term by applying to the VSBC for a certificate and giving a copy of that certificate to the landlord. The Act requires the VSBC to ensure that a tenant understands the consequences of seeking such a waiver certificate.

During 2014-15, the total number of requests received decreased 6.3 per cent to 1,122 with 1,013 (90.3 per cent) certificates issued. The remaining requests did not require certificates to be issued or were withdrawn.

APPOINTMENT OF SPECIALIST RETAIL VALUERS

The VSBC is responsible under the RL Act for appointing a Specialist Retail Valuer 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 market rent review provision of the lease), and the landlord and tenant are unable to agree on the appointment of a valuer.

A total of 98 applications were received in 2014-15, compared with 103 in the previous year.

To appoint a Specialist Retail Valuer, the VSBC seeks a nomination from either the Australian Property Institute (API) or the Real Estate Institute of Victoria (REIV). Both bodies seek two competitive quotes from appropriately experienced valuers, and in all but exceptional circumstances recommend the valuer with the lower priced quote to the VSBC for appointment.

A review of VSBC processes appointing Specialist Retail Valuers was conducted during the year, with some minor changes made to improve efficiency. The VSBC also consulted with the REIV and API to clarify the process for referring complaints concerning rent determinations to those bodies.

CHAPTER 7

FARM DEBT MEDIATION ACT 2011

The *Farm Debt Mediation Act 2011* (FDM Act) requires creditors to offer mediation to farmers before commencing debt recovery proceedings under a farm mortgage.

The FDM Act is jointly administered by the Department of Economic Development, Jobs Transport and Resources (Department) and the VSBC. The Department provides initial information and assistance to farmers and creditors and refers farm debt disputes to the VSBC to arrange mediation.

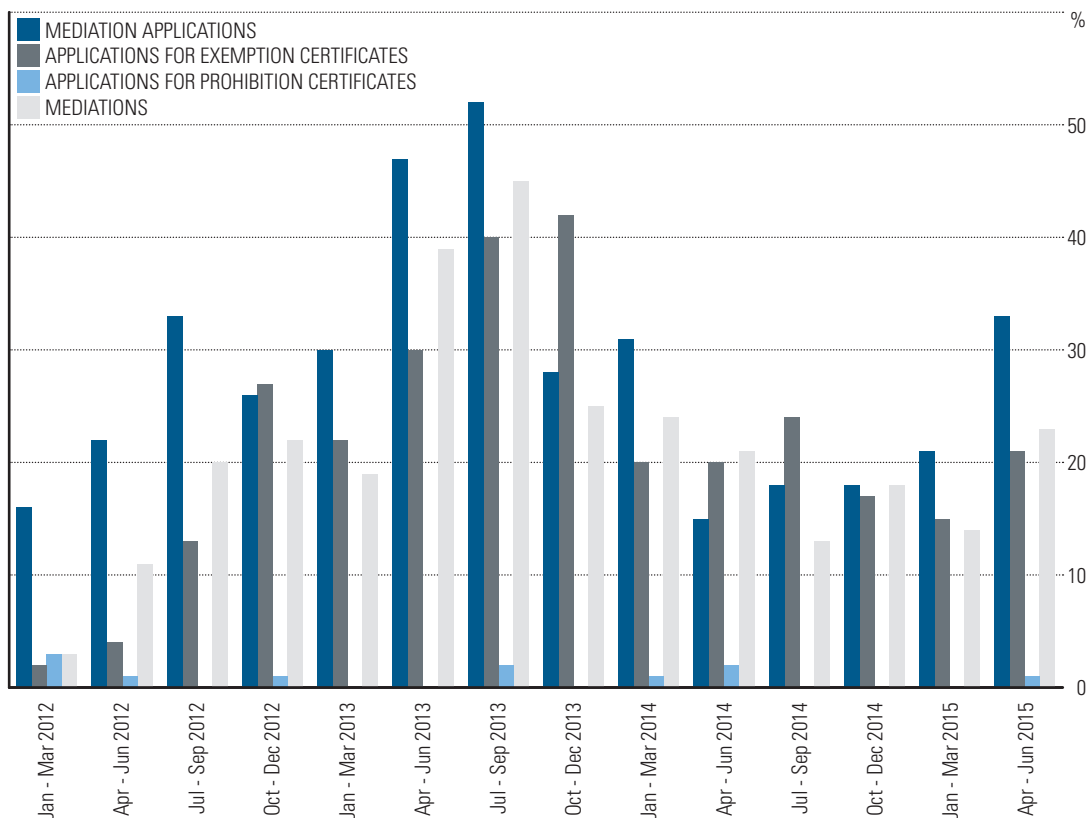
In the third full year of the FDM Act's operation, a total of 168 applications were received (90 applications were requests for mediation and 78 requests for certificates), a 33.6 per cent decline on the total number of applications received in 2013-14. However, mediation applications in the first eight months averaged six per month, increasing to an average 10.5 per month in the last four months of the year.

The main role of the VSBC under the FDM Act is to organise mediations between farmers and creditors. Of the 90 mediation applications received in 2014-15, 84 were creditor initiated and 6 were farmer initiated. For mediations completed in the year (a number are scheduled but yet to be held, or have been adjourned), a settlement rate of 95.5 per cent was achieved.

Farm debt mediations are held in both the VSBC Melbourne office and across regional Victoria, having regard to the needs of farmers and creditors. A number of mediators on the VSBC's External Mediator List are based in regional Victoria to accommodate the demand for regional mediations.

During 2014-15, 57 per cent of farm debt mediations were held in regional Victoria.

FIGURE 9.1 FDM ACT APPLICATIONS BY QUARTER



The other main function for the VSBC under the FDM Act concerns the issuing of exemption and prohibition certificates. Before a creditor may take enforcement action against a farmer, it requires an exemption certificate from the VSBC. Conversely, a farmer may seek a prohibition certificate from the VSBC, which prevents a creditor taking enforcement action until satisfactory mediation has occurred.

During 2014-15 the VSBC handled:

- > 95 exemption certificate requests (77 new requests and 18 which were pending from the previous year). Of these, the VSBC issued 65 certificates, 11 requests were withdrawn, 9 were refused and 10 remain to be completed in 2015-16.
- > One prohibition certificate request.

The issuing of exemption certificates, in particular, can be a complex role for the VSBC. In most cases, a creditor will seek an exemption certificate following satisfactory mediation attaching terms of settlement between the parties. The VSBC must determine if mediation has been 'satisfactory', which may apply even if no terms of settlement are executed. If an exemption certificate is issued, the Act no longer applies and a creditor may commence enforcement action under a farm mortgage.

However, where mediation *Terms of Settlement* are in force, although a creditor is still entitled to apply for an exemption certificate it should not proceed with enforcement action where *Terms of Settlement* are being met.

There is no discretion for the VSBC in issuing certificates where statutory criteria are satisfied. In the one case involving a prohibition certificate application, the farmer sent a notice to the creditor requesting farmer-initiated mediation. The creditor did not respond to the request within the statutory 21 day period. When the creditor learnt of the notice, which had not reached the relevant area in the creditor's office in the required time, it indicated its willingness to proceed with mediation at the earliest opportunity. However, the farmer applied for a prohibition certificate based on the breach of the statutory 21 day response period. The certificate was issued as the VSBC must issue a certificate if all statutory criteria are met. The prohibition certificate prohibits the creditor taking enforcement action until the parties enter into mediation, or six months from the issue date, whichever is the earlier.

The VSBC continues to recognise the important role of the Rural Financial Counselling Service in assisting farmers during the mediation process. For mediations held during 2014-15, 61.8 per cent had a Rural Financial Counsellor (RFC) supporting the farmer. The RFCs provide assistance to the farmer through emotional support, financial guidance and document preparation in what is often a highly emotional time for farmers.

CHAPTER 8

OWNER DRIVERS AND FORESTRY CONTRACTORS ACT 2005

Under the *Owner Drivers and Forestry Contractors Act 2005* (ODFC Act), the VSBC provides a dispute resolution service for contractors and hirers in the transport and forestry industries. The VSBC resolves these disputes through preliminary assistance and mediation.

Other related instruments include the *Owner Drivers and Forestry Contractors Regulations 2006*, information booklets, rates and costs schedules and model contracts.

The legislation prescribes certain minimum conditions for contractors and hirers. Otherwise, it encourages commercial negotiations between parties to regulated contracts. To facilitate bargaining, the legislation enables the appointment of negotiating agents and provides a dispute resolution mechanism via the VSBC.

In 2014-15, the VSBC received 35 dispute applications, 22 per cent lower than 2013-14. The mediation settlement rate for these disputes was 89.3 per cent in 2014-15.

In addition to resolving disputes, the VSBC provides information and education, advising parties about their respective rights and obligations.

Consistent with previous years, disputes generally concern two main issues:

- > contractual disputes; and
- > termination disputes.

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 stipulates that regulated contracts must be in writing.

Most of the disputes that now come before the VSBC concern termination of engagement. These disputes concern termination of the contractor by the hirer with monies allegedly owed to the contractor. Some of these disputes concern a lack of awareness about the

minimum notice requirements under the Act. Other disputes concern termination of the contractor on the ground of *'serious and wilful misconduct'*.

While this expression is not defined under the legislation, its meaning was considered by the Victorian Civil and Administrative Tribunal in *A D A Cartage Pty Ltd v Holcim (Australia) Pty Ltd* [2010] VCAT 1771.

CASE STUDY OWNER DRIVER

An owner driver worked in the transport industry with the same hirer for 18 years. The parties had not entered into a written contract.

The hirer terminated the engagement of the driver by providing two months' notice of termination. As the driver owned a heavy vehicle, the driver claimed he was entitled to three months' notice of termination, as required under section 21 of the ODFC Act.

The hirer claimed it was not obliged to provide three months' notice to the driver because it thought the legislation only applied to the forestry, not transport, industry.

The driver lodged a dispute with the VSBC seeking an additional month's notice.

The VSBC resolved the dispute by preliminary assistance. The hirer agreed to provide the extra month's notice.

The driver's wife appreciated the VSBC assistance, stating:

"Thank you very much for all your assistance, without your help we wouldn't have had any success in getting this resolved. Your Office is a great resource for small business and owner drivers."

If mediation is unsuccessful, or a respondent refuses to attend mediation, the VSBC can issue a certificate to enable the dispute to proceed to VCAT for determination. During 2014-15, five certificates were issued.

CHAPTER 9

TRANSPORT (COMPLIANCE AND MISCELLANEOUS) ACT 1983

26

From 1 July 2014, the VSBC had responsibility for providing mediation services for certain disputes between contractor taxi drivers and taxi operators relating to the Driver Agreement.

Such disputes cannot be lodged directly with the VSBC. They must first be lodged with the Taxi Services Commission, which attempts to resolve the dispute through preliminary assistance – as the VSBC provides for disputes lodged under other Acts.

If the Taxi Services Commission cannot resolve the dispute through preliminary assistance, it must determine whether the dispute is amenable to mediation. If so, it issues a certificate to the applicant party enabling that party to lodge a mediation application with the VSBC. Such application must be lodged within 30 days of receipt of the certificate.

If not amenable to mediation, the Taxi Services Commission issues a certificate to the applicant enabling the matter to progress to the Victorian Civil and Administrative Tribunal (VCAT) for adjudication.

Mediation is most appropriate where there is scope for a negotiated settlement, rather than when the dispute is 'black or white'. Further, the VSBC will rarely conduct mediation when the amount in dispute is less than \$1,500, given the cost to conduct the mediation. Each party pays only \$95 for VSBC mediation (as also applies for mediation under the *Owner Driver and Forestry Contractors Act 2005*).

During the year, only one dispute application was lodged with the VSBC under this Act. In that instance, the VSBC was unable to contact the respondent party, and a certificate was issued to the applicant to enable it to proceed to VCAT.

CHAPTER 10

STATEMENT OF EXPECTATIONS

The Statement of Expectations (SOE) for the Victorian Small Business Commissioner sets out the Minister's expectations of the VSBC's contribution to the Government's program to reduce red tape affecting businesses and other entities. The SOE sets out key governance and performance objectives and targets aimed at improving and administration and enforcement of regulation.

The current SOE applicable to the VSBC was issued by the then Minister for Small Business, the Hon. Russell Northe MP, in July 2014.

Reporting on the progress to achieve SOE performance targets is required to be undertaken as part of the annual reporting process.

The four SOE objectives, and activities undertaken to address them, are:

Develop a monitoring regime to ensure optimal efficiency in implementation of reform processes (arising from the 1 May 2014 amendments) under the *Small Business Commissioner Act 2003*

Activities undertaken:

- > A process flow and business rules were developed for handling applications consistently.
- > Guidelines on 'unreasonable refusal' were developed with input from the Victorian Government Solicitor's Office, published on the VSBC website, and a copy provided to all respondent parties to dispute applications under the SBC Act.
- > All decisions on whether refusal is 'unreasonable' or not are documented to facilitate consistent approaches over time, and for review.
- > Decisions on 'unreasonable refusal' are not delegated by the Commissioner, to assist in ensuring consistent approaches.

- > Improvements to processes were effected to ensure respondent parties received notification regarding intent to issue certificates, and intent to publish details of such certificate. These included use of registered mail (with receipt), and conducting company and business name searches to ensure the appropriate entity, and appropriate public officers of the entity, are notified.

- > All files relating to 'unreasonable refusal' certificates are reviewed in detail prior to finalising details to be included in the Annual Report.

Review existing guidance materials and develop new collateral focussing on reforms (from 1 May 2014) under the *Small Business Commissioner Act 2003*

Activities undertaken:

- > All brochures, information sheets, and web pages were reviewed and updated/ modified as required to reflect the broadened jurisdiction of the VSBC and the 'unreasonable refusal' certificate and naming functions, where appropriate.
- > Guidelines for 'unreasonable refusal' were developed, and were reviewed at the end of 2014-15 to ensure continuing relevance and accuracy.
- > Presentations were updated to reflect the amendments to the SBC Act enabling 'unreasonable refusal' certificates and naming.
- > A review of questions asked of telephone callers relating to 'unreasonable refusal' did not identify any systemic issues or concerns warranting further development of information sheets, updated online content or FAQs.

Review the appointment process for Specialist Retail Valuers under the *Retail Leases Act 2003*.

Activities undertaken:

- > A review was undertaken and a number of changes were made to VSBC processes including:
- > Improvements to the Application for Appointment of a Specialist Retail Valuer form were identified and implemented;
- > A process for referring complaints concerning the appointment of valuers was concluded;
- > Pro forma correspondence was amended to better reflect the appointment procedure; and
- > Pro forma correspondence was amended to include information about services that can assist with language barriers.

Additionally, a Rent Review information sheet was published to assist landlords and tenants in understanding the process to resolve rent disputes.

Include a question seeking improvements to content or process on all major forms.

Activities included:

Two additional (non-mandatory) questions were added to Application forms:

- 1 Please rate your experience with:
 - a Locating this application form on our website
 - b Completing this application form

Both parts to this question used a 5 scale rating:
1 Very Easy – 5 Very Difficult

- 2 Please add any additional comments about the application form (free form text).

Answers to Question 1 showed that 86.4 per cent of applicants found the application form 'easily' or 'very easily', while 2.8 per cent found it 'difficult' or 'very difficult'.

Answers to Question 2 showed that completing the form was 'easy' or 'very easy' for 81.6 per cent of applicants, while 3.9 per cent found it 'difficult' or 'very difficult'.

There were few comments received in response to Question 2. Some parties were unhappy with the mandatory nature of the fields for the ABNs for parties identified as companies. However, the form allows for the party to be identified as an 'individual', in which case the ABN field is no longer mandatory, as the form can be printed for completion and lodgement. Other parties complained about the requirement to provide contact details for the respondent. Some applicants also experienced technical difficulties when using their usual internet browsers. Most of the applicants who made comments using this field, actually provided additional information about the case, which should have been included in the dispute description section.

In addition, feedback forms provided by mediation participants enable free form text comments. These are reviewed at the end of the year to identify any negative comments on mediators, mediation processes or other VSBC processes. In 2014-15, 382 of 961 feedback forms included text comments, 24 (6.2%) of which were negative. Of these, 17 related to processes or facilities, five related to the mediator, and two related to cost. These comments are reviewed to identify areas for improvement. A selection of the positive comments is provided in Chapter 12.

CHAPTER 11

NATIONAL ISSUES

UNFAIR CONTRACT TERM PROTECTIONS FOR SMALL BUSINESS

The VSBC provided a detailed submission, data and case studies to the Commonwealth Government review into extending unfair contract term protections to small business.

An exposure draft of the Commonwealth Bill was circulated for comment during 2014-15 and introduced in Commonwealth Parliament late in the year. The VSBC welcomes the intent to extend these protections to small businesses as a significant proportion of disputes lodged with the VSBC relate to terms which, if in consumer contracts, would likely be considered unfair and therefore void.

The VSBC has previously raised the prevalence of unfair contract terms across the waste management sector. Other industry sectors where such terms are common include online and print advertising, in-site advertising, security monitoring, and web services, including search engine optimisation.

AUSTRALIAN SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN

The VSBC made detailed submissions to the Commonwealth Government on this topic during the course of the year, and held a number of discussions with Commonwealth officials on the role, functions and operations of the proposed Ombudsman.

The key point made by the VSBC is that the Ombudsman should not duplicate dispute resolution functions provided by other agencies such as state Small Business Commissioners. The Commonwealth Bill to establish the Ombudsman was introduced in the Commonwealth Parliament in May 2015.

NATIONAL FARM DEBT MEDIATION

The VSBC provided input to a working group looking at the possibility of extending statutory farm debt mediation beyond Victoria and NSW.

ENGAGEMENT WITH OTHER AGENCIES

Small Business Commissioners met every quarter with the Australian Small Business Commissioner and the Deputy Chair (Small Business) of the Australian Competition and Consumer Commission (ACCC) to share information on emerging trends and issues. These meetings also provide an opportunity to benchmark operational activities.

The VSBC also attended as an observer the Small Business Advisory Committee and the Franchising Code Advisory Committee held half-yearly by the ACCC.

CHAPTER 12

MEDIATION POLICIES AND PRACTICES

30

THE BENEFITS OF MEDIATION

Mediation is a process where the parties in a dispute come together to discuss their dispute with the assistance of an independent mediator. It is a process of confidential negotiation which assists the parties to identify and explore options for the resolution of their dispute.

Mediators are appointed on a case by case basis by the VSBC.

Two key benefits of a mediated outcome are:

- > creative outcomes: the mediator can often identify elements of a settlement that had not occurred to the parties, but assist in forging a successful settlement; and
- > ongoing business relationship: a quick, mediated outcome can often enable the parties to the dispute to successfully continue to do business with each other.

APPOINTMENT OF MEDIATORS

The VSBC has been offering mediation since its commencement in 2003. It primarily uses an external list of mediators, but also has one internal mediator.

A formal policy on the VSBC's approach to mediator appointment is published on the VSBC website at vsbc.vic.gov.au

The policy articulates the requirements for a mediator's inclusion on the list, and the approach taken by the VSBC in appointing mediators to specific mediations. In particular, the policy makes clear that the appointment of mediators is entirely at the discretion of the VSBC. There is no expectation or commitment that being on the mediator list ensures some or any mediation appointments.

A key driver behind the appointment of mediators to mediations by the VSBC is the requirement, set in Budget Papers, to achieve at least a 75 per cent settlement rate across all mediations conducted. In appointing mediators to mediations, the VSBC considers the past mediation success rates of mediators, the circumstances of the dispute, feedback received from previous mediation participants, the expertise of the mediator, their flexibility (e.g. willingness to travel; willingness to accept a mediation at short notice), their compliance with VSBC administrative requirements, and the need to ensure a continuing pool of mediators with high success rates.

MEDIATIONS IN 2014-15

Between 1 July 2014 and 30 June 2015, 935 mediations were scheduled, of which 789 were conducted. Conducted mediations increased 10.5 per cent over the year.

Interpreter services to assist parties from different cultural backgrounds were arranged for 26 mediation sessions during this period. (Mandarin 12, Persian 3, Vietnamese 2, Japanese 2, Greek 2, Cantonese 1, Korean 1, Tamil 1, Telugu 1 and Chinese 1).

TABLE 12.1 MEDIATIONS SCHEDULED AND CONDUCTED

	2013-14	2014-15	Increase %
Scheduled mediations	928	935	0.8
Conducted mediations	714 (76.9%)	789 (84.4%)	10.5

The difference between mediations scheduled and conducted occurs when:

- > parties request a change to the mediation date, notwithstanding they have initially agreed to the proposed date and time;
- > the dispute settles prior to mediation;
- > parties change their mind and decline to attend; or
- > a party does not show up on the day.

TABLE 12.2 MEDIATIONS CONDUCTED IN VSBC OFFICES, OTHER METROPOLITAN AND REGIONAL VENUES

Month	Total	Venue		
		VSBC	Other Metro	Regional
Total	789	679	8	102
%	100.0	86.1	1.0	12.9

Mediation success rates, for those mediations that were completed in 2014-15 (some are adjourned) was 81.7 per cent. The highest success rate was achieved in mediations conducted under the *Farm Debt Mediation Act 2011* – 95.5 per cent, followed by 89.3 per cent for owner driver mediations, 85.3 per cent for general business disputes, and 78.5 per cent for retail tenancy mediations.

CLIENT SATISFACTION WITH MEDIATION

The VSBC seeks feedback from parties and their representatives attending mediations. In 2014-15, 961 feedback forms were received. A customer satisfaction index is calculated based on answers to seven questions, each rated on a 1-5 scale.

The overall satisfaction rate with the mediation services provided by the Office was 94.7 per cent, compared with 93.6 per cent in 2013-14.

Feedback is also sought on the overall performance of the mediator, against a number of criteria.

The Figures below profile customer satisfaction results on a range of variables. Client satisfaction of the service and the mediator was consistently high across:

- > different parties;
- > parties' representatives;
- > whether the mediation outcome was full agreement, partial agreement or no agreement; and
- > alternative locations of the mediation.

FIGURE 12.1 CLIENT SATISFACTION WITH THE MEDIATION SERVICE IN RELATION TO THE ROLE OF THE PARTY IN MEDIATION

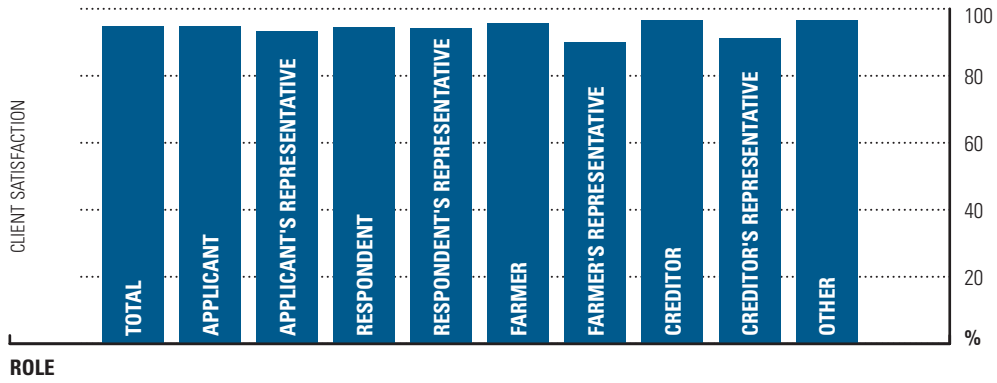


FIGURE 12.2 CLIENT SATISFACTION WITH THE MEDIATION SERVICE IN RELATION TO THE MEDIATION OUTCOME

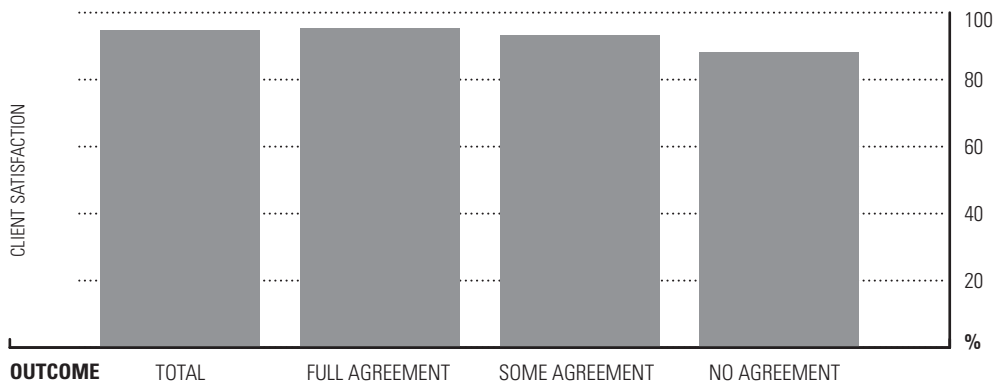


FIGURE 12.3 CLIENT SATISFACTION WITH THE MEDIATION SERVICE IN RELATION TO THE MEDIATION VENUE

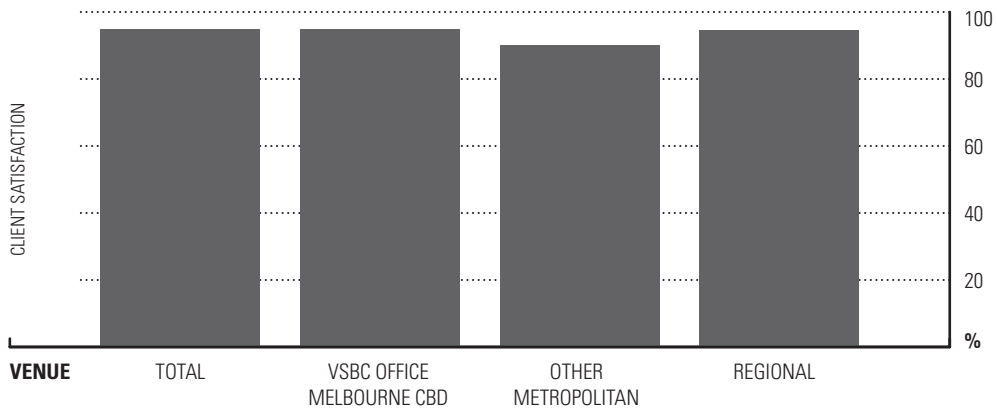


FIGURE 12.4 CLIENT SATISFACTION WITH THE MEDIATOR IN RELATION TO THE ROLE OF THE PARTY IN MEDIATION

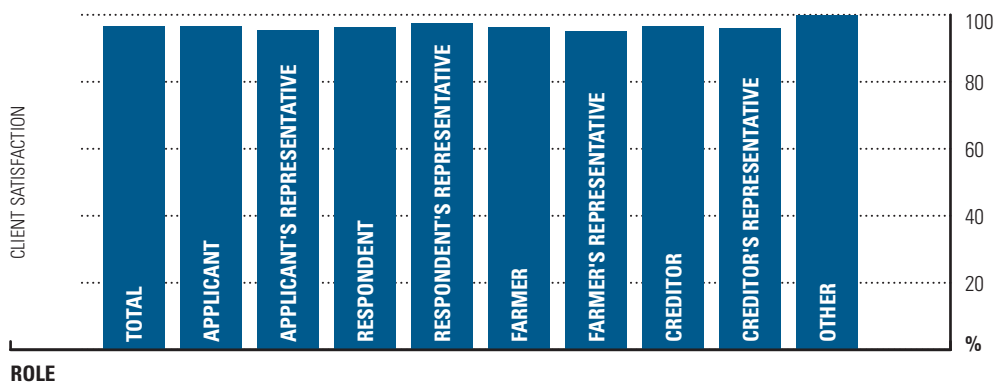


FIGURE 12.5 CLIENT SATISFACTION WITH THE MEDIATOR IN RELATION TO THE MEDIATION OUTCOME

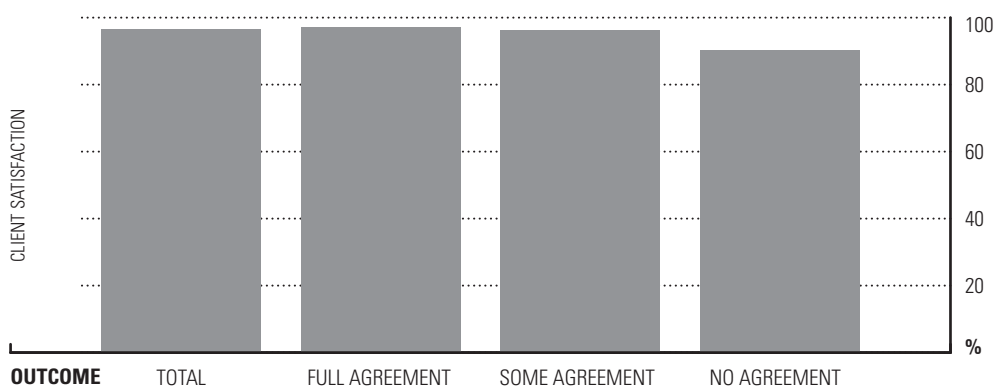


FIGURE 12.6 CLIENT SATISFACTION WITH THE MEDIATOR IN RELATION TO THE MEDIATION VENUE

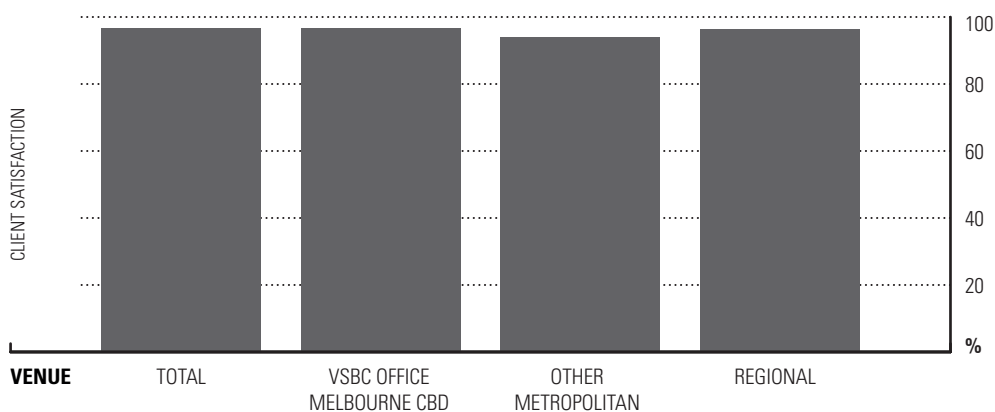
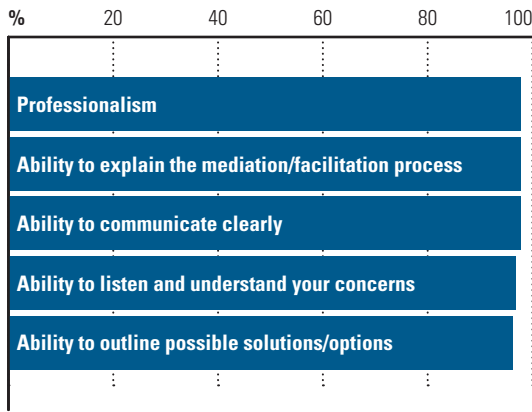


FIGURE 12.7 PERFORMANCE OF MEDIATOR



BENEFITS OF MEDIATION

All parties were asked whether the mediation service had saved them time or money compared with the alternative of litigation. Nearly 90 per cent of those who answered this question indicated it had saved time and 81.4 per cent saved money. These responses need to be interpreted against parties’ expectations prior to mediation and the outcome of the mediation. A party may expect significant financial benefit, but end up with a lower, compromise outcome. Alternatively, a party may expect to incur no cost arising from the mediated settlement, only to enter a settlement where they agree to some outlay. Further, the parties may not be able to estimate likely cost and time if the matter had proceeded to litigation.

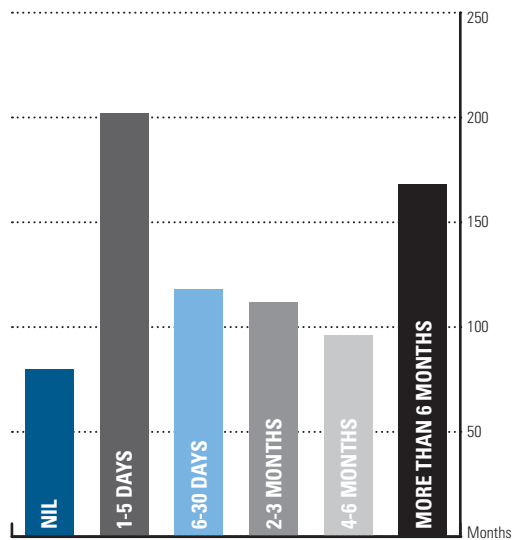
TIME SAVED BY MEDIATION

Survey participants were asked to estimate the average time saved as a result of using the VSBC’s mediation service and avoiding tribunal or judicial proceedings:

TABLE 12.3 TIME SAVED BY MEDIATION

How much time have you saved?		
		%
Survey forms returned	961	
# of responses	776	
Nil	80	10.3
1-5 days	202	26.0
6-30 days	118	15.2
2-3 months	112	14.4
4-6 months	96	12.4
More than 6 months	168	21.6
No response	185	

FIGURE 12.8 TIME SAVED BY MEDIATION



The average time saved exceeded 71 days per party.

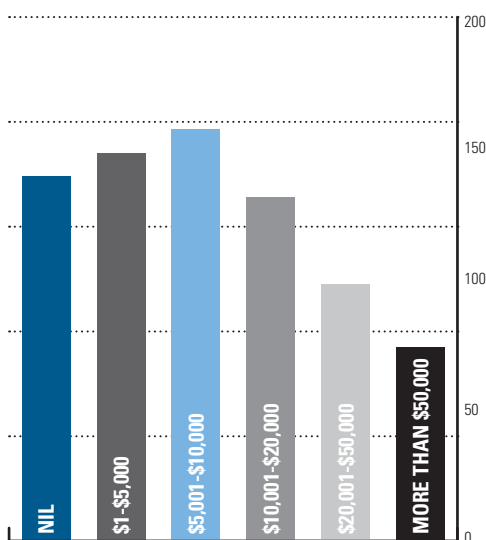
MONEY SAVED BY MEDIATION

Survey participants were also asked to provide an estimate of the amount saved as a result of using the VSBC's mediation service and avoiding tribunal or judicial proceedings:

TABLE 12.4 MONEY SAVED BY MEDIATION

How much money have you saved?		%
Survey forms returned	961	
# of responses	747	
Nil	139	18.6
\$1 – \$5,000	148	19.8
\$5,001 – \$10,000	157	21.0
\$10,001 – \$20,000	131	17.5
\$20,001 – \$50,000	98	13.1
More than \$50,000	74	9.9
No response	214	

FIGURE 12.9 MONEY SAVED BY MEDIATION



The average amount saved exceeded \$14,000 per party.

OTHER COMMENTS ON THE BENEFIT OF MEDIATION

Many feedback forms provided comments on the positive effect of the mediation process and outcome. They also highlight the negative effect a commercial dispute can have on small and medium businesses, and the relief of having the dispute settled through mediation.

Comments included:

"This whole experience was excellent. The Mediator kept the process totally focussed on the issues, and what appeared impossible came to a satisfactory resolution by the end of the day which is most appreciated."

"Extremely impressed with knowledge and skills of Mediator. Displayed an amazing level of professional conduct."

"The mediator was incredibly helpful; mediated an issue which has been going on for two years into a resolution. Brilliant!"

"This was and is a very good process to help people from wasting time and money and being emotionally distressed."

"The mediator was very good at managing a very difficult and emotional dispute."

"I truly appreciate your help in relieving my agony over this matter."

"The mediation process is a much better process than the law courts as participants can sit down and discuss options openly."

"The time saved (and associated stress) was of most benefit."

"The mediator was very efficient and effective. Very polite and professional. Without this process, it would have cost over \$70K and months of time in our lives. We are extremely glad we chose this option. Thank you!"

"I feel the mediation gave me a voice. I was able to express my wishes and I was listened to."

"Very positive experience where farmer can express their concerns in a non-threatening environment and generally a commercially sensible binding agreement can be reached."

"The mediator was outstanding and she assisted the parties to reach a resolution that was not expected at the start of the day. Everyone was very happy."

"Felt very safe and I believe the mediator has saved not only myself but the respondent a huge amount of money and we all realise that money is best spent on growing our business."

"Absolutely brilliant process and the mediator was outstanding, very clear and delivered a safe environment for all concerned given the complexity of the case/claim."

"First time being put in this position, we found process much less daunting than facing court and felt process more fair in how it is handled."

"Whilst very prepared for this, I don't pretend I didn't come to this meeting with some anxiety and nervousness. The mediator really made me feel comfortable from the get go and continued to advise and guide me through the afternoon, right until the successful settlement and agreement was signed. Thank you very much."

"Excellent mediator, this is preventative medicine, saving a fortune for all in the long run."

"I have saved mental stress dealing further with an ex-tenant who has serious personality issues."

"The mediator made a very unpleasant situation very comforting, informative and very easy to come to an agreement with both parties."

"Excellent option for not-for-profit organisation. Saved money and time for our small organisation."

"Great service for small businesses!"

CHAPTER 13

BUILDING A SUSTAINABLE ORGANISATION

The VSBC made a number of operational improvements during the year. These included:

PAYMENT OPTIONS FOR MEDIATION

The VSBC commenced offering EFT and credit card payment facilities for parties participating in mediation.

CONSISTENT INVOICING

Since December 2011, two payment and invoicing arrangements for mediations were in place. Commencing 2003, the parties would pay their mediation contribution to the mediator, and the mediator would invoice the VSBC for the difference between the agreed mediator fee and the amount paid by the parties. However, the *Farm Debt Mediation Act 2011* requires that the fee payable by the parties "must be paid to the Small Business Commissioner ...". For farm debt mediations, the mediator would invoice the VSBC for the full mediator fee.

From January 2015, the invoicing arrangement required for farm debt mediations has been adopted for all VSBC mediations, to provide a single invoicing arrangement.

ONLINE FORMS

During the year, all major application forms were enabled for online lodgement.

INFORMATION SESSIONS

The VSBC continued to hold half-yearly information sessions for staff and mediators on topics of interest and relevance. The July 2014 session focused on how to recognise and respond to people displaying depression and/or suicidal tendencies. The information session led to a full day training session being conducted for all VSBC staff.

The December 2014 session included a presentation by the Australian Small Business Commissioner.

FEEDBACK ON PRELIMINARY ASSISTANCE

To supplement the feedback obtained from parties at mediation, the VSBC seeks feedback from businesses involved in disputes which are resolved prior to mediation through preliminary assistance. A link to an online survey is emailed to both applicant and respondent business once a matter has been resolved through preliminary engagement with the parties.

During the year, 80 responses were received from 260 surveys sent. Seventy five per cent of responses came from the applicant business. Using a 5 point scale (1: Very Poor – 5: Very Good) responses rated the preliminary assistance role at 4.75, or 95.0 per cent satisfaction.

The survey also asks whether the role played by the VSBC in resolving the dispute was substantial, moderate, or minimal. Aggregate results were 51.3 per cent, 26.3 per cent and 22.5 per cent respectively. A 'minimal' role can often simply be the act of sending a letter with the Applicant's complaint to the CEO of the Respondent party, which can trigger a response by the Respondent to resolve the issue.

CHAPTER 14

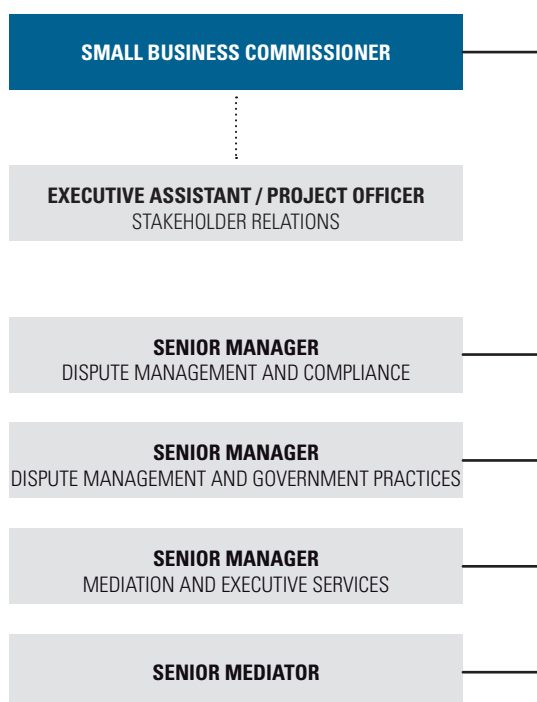
ORGANISATIONAL ARRANGEMENTS

OVERVIEW

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 Economic Development, Jobs, Transport and Resources (Department) under Part 3 of the Public Administration Act 2004. They participate in Departmental training, performance management and HR activities and conform to Departmental financial and other policies and codes of conduct.

FIGURE 14.1 ORGANISATIONAL STRUCTURE



OCCUPATIONAL HEALTH AND SAFETY

VSBC is committed to providing a work environment that is, as far as it is reasonably practical, free from risks to the safety, health and well-being of staff (including VPS employees, agency on hire staff, contractors, trainees) and visitors.

In 2014-15, no issues arose in relation to occupational health and safety.

ENVIRONMENT

VSBC is committed to sustainable practices through waste minimisation, energy efficiency, paper reduction, recycling and integrating environmental sustainability within the Department's corporate governance, planning and procedures.

SYSTEMS

Corporate support services (financial, information technology and records management) are provided by the Department.

Specific database applications have been developed for:

- > dispute application management and reporting;
- > preliminary enquiries;
- > *Retail Leases Act 2003* section 21 Certificate applications; and
- > Survey reporting – client satisfaction with mediation services and preliminary assistance.

FREEDOM OF INFORMATION

One Freedom of Information request directed to the activities of the Victorian Small Business Commissioner during 2014-15 was completed during the year.

PROTECTED DISCLOSURE PROCEDURES

The VSBC operates in accordance with the Department's Whistleblowers Protection Procedures.

As at 30 June 2015, the VSBC had not received any disclosures made under the *Protected Disclosure Act 2012*, nor had the Ombudsman referred any such disclosures to the Office for investigation.

MAJOR CONTRACTS

The Office did not enter into any contracts over \$10 million in the period 1 July 2014 to 30 June 2015.

CONSULTANCIES

In 2014-15, the Victorian Small Business Commissioner entered into one consultancy where the total fees payable to the consultants were \$10,000 or greater. The total expenditure for this consultancy was \$12,000 (excluding GST).

TABLE 14.1 CONSULTANCIES

Consultant	Purpose of consultancy	Start date	End date	Total approved project fee (excluding GST)	Expenditure 2014-15 (excluding GST)	Future expenditure (excluding GST)
Victorian Government Solicitor's Office	Legal advice	24/02/15	01/04/15	\$12,000	\$12,000	\$0

In 2014-15, the VSBC engaged in seven consultancies where the total fees payable to the consultants were less than \$10,000, with a total expenditure of \$20,202.30 (excl. GST).

CHAPTER 15

FINANCIAL STATEMENT

40

FINANCIAL STATEMENT 1 JULY 2014 – 30 JUNE 2015

1 July 2014 – 30 June 2015	
\$	
Funding	
Appropriation	
Small Business Commissioner	2,585,000
Farm Debt Mediation	876,400
Total Funding	3,461,400
Expenditure	
Employee Related Expenses	2,268,743
Other Operating	1,079,737
Total Expenditure	3,348,480

Notes

Appropriation funding includes \$176,400 carryover from 2013-14.

Expenditure of \$206,849 was incurred by the Department of Environment and Primary Industries / Department of Economic Development, Jobs, Transport and Resources in relation to the administration of the Farm Debt Mediation Act 2011.