

## **Policy –**

### **Appointment of mediators by the Victorian Small Business Commissioner**

The Victorian Small Business Commissioner (VSBC) may appoint a mediator to mediate a dispute arising under the *Small Business Commissioner Act 2003*, the *Retail Leases Act 2003*, the *Owner Drivers and Forestry Contractors Act 2005*, the *Farm Debt Mediation Act 2011* and the *Transport (Compliance and Miscellaneous) Act 1983*.

The mediator will be [one of] –

- a suitably qualified and experienced member of the Office of the Victorian Small Business Commissioner ('internal mediator'),
- the Small Business Commissioner him/herself, or
- an external mediator appointed from the External Mediator List.

The VSBC is required by the Victorian Government to achieve successful mediation outcomes in at least 75% of mediations undertaken. Since commencement in 2003, The Office of the Victorian Small Business Commissioner has achieved a mediation success rate of around 80%.

The VSBC is required by the Victorian Government to achieve client satisfaction rate with mediations undertaken of at least 80%. The VSBC currently achieves client satisfaction rates of over 90%.

### External Mediator List

The VSBC maintains an External Mediator List. The website of the VSBC invites Expressions of Interest from appropriately qualified and experienced mediators to join the External Mediation List at any time, and publishes this policy document.

Mediators on the External Mediator List have:

- Mediator accreditation under the National Mediator Accreditation System (NMAS) by a Recognised Mediator Accreditation Body
- Relevant experience
- Indicated relevant jurisdictional capability and knowledge
- Agreed to comply / demonstrated compliance with the administrative requirements of the VSBC
- Confirmed their ability to undertake mediation appointments if offered

- Advised current Professional Indemnity Insurance<sup>1</sup>.

Further, mediators on the List must satisfy the requirements of specific Acts for which the mediator seeks listing, viz:

- *Retail Leases Act 2003* s.84(2):  
'persons who are experienced in the field of retail premises leases.'
- *Owner Drivers and Forestry Contractors Act 2005* s.54(2):  
'persons who are experienced in the field of regulated contracts.'
- *Farm Debt Mediation Act 2011* s.20(3)(b):  
'persons (who) have the skills and experience to conduct a mediation in a particular case.'

The VSBC may from time to time confirm whether a mediator on the External Mediator List continues to satisfy these criteria, and may remove a mediator from the List if any criteria are not satisfied.

Appointment to, and removal from the List remains at the discretion of the VSBC. In addition to the above criteria, the VSBC shall consider any matters raised in the Personal Declaration made by the mediator/applicant, and may also take into account any matter he reasonably considers relevant, including performance and conduct.

While inclusion of a mediator on the External Mediator List is necessary for a mediator to be allocated mediations by the VSBC, inclusion on the List does not entitle a mediator to a minimum number or any mediations.

#### Appointment to Mediations

The VSBC will determine the most appropriate mediator to be invited to be appointed to undertake a mediation having regard to a range of considerations. This may be him/herself, an internal mediator, or an external mediator.

The appointment of an external mediator to a mediation is entirely at the discretion of the VSBC.

There is no commitment to any mediator on the External Mediation List of appointment to any mediation.

The VSBC may appoint him/herself to a mediation at any time.

The appointment of an Internal Mediator to a mediation will be at the discretion of the VSBC.

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<sup>1</sup> Amendments to the *Small Business Commissioner Act 2003* in 2014 provided statutory indemnity for mediators "for anything necessarily or reasonably done or omitted to be done in good faith....". As a consequence, Professional Indemnity Insurance is no longer a mandatory requirement for mediators but is strongly recommended.

The VSBC may delegate the function of appointing a mediator. This function is currently delegated to the Senior Manager, Mediation & Executive Services.

The Primary considerations in inviting mediators to undertake a mediation are:

- The capability, knowledge and experience of the mediator relevant to the particular Act under which the mediation is to occur
- The success rate of the mediator in achieving settlements at mediations conducted for the VSBC

Note: to achieve an aggregate mediation success rate of 80%, the VSBC must appoint mediators with high expected success rates (based on past proven performance), particularly those with 80%+ success rates. Where there are relatively few mediators with 80%+ success rates, this inevitably means that these high success rate mediators are more likely to be offered more mediations than those with lower success rates (though other factors are also considered for the allocation of mediations).

- The past client satisfaction ratings of mediators

Note: to continue to achieve high customer satisfaction ratings, the Office will have regard to feedback provided by clients on mediators – both positive and negative.

- Avoiding any conflicts of interest
- The provision of some opportunity for new or relatively new mediators to demonstrate their mediation success rates through VSBC mediations

Note: the VSBC needs to carefully manage the number of mediations offered to new or relatively new mediators (i.e. with an unproven success rate in VSBC mediations) against the overarching 80% success rate target. Some new or relatively new mediators need to be given the opportunity, over time, to demonstrate that they will (or will not) become a high success rate mediator. It is important for the VSBC to identify the high success rate mediators as early as practical, and equally to identify those not achieving a satisfactory level of mediation settlements to enable the Office to achieve its target.

The number of mediations offered to new or relatively new mediators is entirely at the discretion of the VSBC, and will be influenced by factors including: aggregate success rate for all mediations, volume of mediations, mediator availability, mediator performance and experience in non-VSBC mediations; as well as the Additional considerations set out below.

The Additional considerations in inviting mediators to undertake a mediation are:

- The nature of the dispute and the demeanour of the parties (and their representatives where present)
- The availability of the mediator for the mediation, including urgent mediations
- Demonstrated flexibility in accepting any necessary changes to mediation arrangements
- A high level of responsiveness to requests from the office (e.g. prompt return of emails/ phone calls re availability)
- The willingness of the mediator to travel if necessary
- Adherence to the Office's administrative requirements (e.g. providing adequate reports, documentation within required timeframes)
- Proven record of finalising adjourned mediations by telephone or email.

In addition, as the mediators represent the VSBC when undertaking mediations, the mediators are required to behave courteously, appropriately, professionally and with tolerance in their dealings with the parties and the staff of the Office.

### Monitoring

The VSBC will review, at least quarterly, mediator success rates, client satisfaction comments, the aggregate mediation success rate, and other feedback relevant to the above considerations to inform decisions on allocation of mediations in the following quarter.

### Reporting

The VSBC will make available to individual external mediators, on request:

- their record of successful mediations conducted for the VSBC, compared with the (de-identified) profile of successful mediations conducted for the VSBC
- feedback on the mediator provided by clients.