



Victorian  
**Small Business  
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Dr. Kathleen Dermody  
Committee Secretary  
Senate Economics References Committee  
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Dear Dr. Dermody

### **Inquiry into the need for a national approach to retail leasing arrangements**

Thank you for your invitation to make a submission to this Inquiry.

Compared with other States, the role of Small Business Commissioner in Victoria is quite tightly focussed on dispute prevention and dispute resolution of commercial disputes, including retail tenancy disputes. The *Retail Leases Act 2003 (Vic)* ('RLA Vic') provides the legislative base for the alternative dispute resolution services my Office provides for retail tenancy disputes. It also sets out processes for the appointment of a Specialist Retail Valuer to determine market rent in retail premises where the parties are in dispute over market rent. As such, this submission is limited to this aspect of the terms of reference.

#### **Overview**

The establishment of the office of Victorian Small Business Commissioner (VSBC) through the *Small Business Commissioner Act 2003 (Vic)* coincided with the commencement of the RLA Vic in May 2003. The RLA Vic introduced for the first time mandatory referral of retail tenancy disputes to the VSBC for resolution via alternative dispute resolution (ADR) or certification to enable a dispute to proceed to the Victorian and Administrative Tribunal (VCAT). The predominant method of ADR used by the VSBC from 2003 has been mediation, although we continue to attempt to resolve disputes prior to mediation through early engagement with the parties.

Retail tenancy disputes continue to be the dominant type of application received by this office. In 2013-14, 911 applications for assistance with a retail tenancy dispute were received. This comprised 62% of all dispute applications received across all legislative areas.

Our service is affordable, effective and timely. If a matter can be resolved prior to mediation, there is no cost to either party. If it progresses to mediation, we charge \$195 to each party for a half day mediation session. My Office subsidises the balance of the mediator cost. If a party wishes to have representation at the mediation, they can elect to do so. We arrange the venue, and when mediation is conducted in regional Victoria, we reimburse the mediator (if travel is required) for travel costs and pay for the regional mediation venue hire.

We can schedule and conduct a mediation within 24 hours, if the parties agree. Our median time for mediation is 8 weeks, and 80 per cent are scheduled within 12 weeks. This includes the time taken to try to resolve the dispute prior to mediation, and the time for both parties and any representatives to agree to a common time, date and location once in-principle agreement to mediate has been reached.

Of those retail tenancy disputes concluded in 2013-14, we resolved 27.6% prior to mediation, and 77.6% of mediated matters settled. Since 2003 we have consistently achieved a mediation settlement rate across all legislative areas of around 80%.

Some parties refuse to participate in mediation, or cannot be contacted. In 2013-14, 19.7 per cent of retail tenancy dispute files 'concluded' in this way. There is some incentive for parties to engage with my Office, however, as the RLA Vic provides VCAT (as the relevant jurisdiction) with the discretion to award costs against a party that has refused to engage with my Office in ADR.

We invite parties to mediation to complete a feedback form after mediation. We have consistently achieved a satisfaction rating from mediation participants of greater than 90% in past years. This high rating is regardless of whether the party is landlord or tenant, applicant or respondent, suggesting a highly regarded, effective and neutral service.

Under the RLA Vic I also appoint Specialist Retail Valuers where parties cannot agree on market rent. In 2013-14, 103 appointments were made, similar to the previous year. Similar to our ADR service, this process provides a means by which parties can gain independent resolution of their rental dispute without the need to litigate. The valuer does charge the parties its market based fee, on a 50%- 50% basis, compared with the subsidised fee charged for mediation.

The ADR provisions under the RLA Vic apply where the dispute relates to 'retail premises'. The definition of 'retail premises' in the RLA Act is quite broad, as recent Tribunal and Court decisions have confirmed. This broad definition has meant that many more businesses have benefited from the affordable, effective and timely ADR services provided by my office under the RLA Vic than may have occurred if a narrower definition of retail premises applied. The definition of 'retail tenancy dispute' has recently been proposed to expand to include disputes concerning guarantors of retail leases. This proposal is currently before the Victorian Parliament.

#### **The need for a national approach?**

The VSBC has successfully provided the above services to retail tenants and landlords since 2003, under State law. The successful and efficient provision of these services is unaffected by the specific provisions of that law, or whether it is the same as, or different from, other State laws.

Similar dispute resolution services via Small Business Commissioners now exist for retail tenancy disputes in NSW, WA and SA.

The success of the VSBC and other Small Business Commissioners in resolving retail tenancy disputes and keeping businesses out of litigation suggests similar ADR services would be of benefit to landlords and tenants in States and Territories which do not currently offer similar services.

I trust this information is of some assistance. Please contact me if you require further information.

Yours sincerely

Geoff Browne  
Victorian Small Business Commissioner

20/8/14