

Code of Conduct

1. The mediator's role

- 1.1 The mediator must attempt to assist the parties to resolve their dispute.
- 1.2 The mediator must give each party the opportunity to speak and, as far as possible, ensure that the other party (or parties) listen.
- 1.3 The mediator may meet with the parties together (joint sessions) or with one or more parties in the absence of others (private sessions).
- 1.4 The mediator may ask questions of the parties in joint or private sessions to assist them to gain a better understanding of their chances of success or failure if the matter were to go to a hearing, but should not insist on an answer.
- 1.5 The mediator may assist the parties to develop options and approaches for settling disputes and is not limited to the types of orders that would be made if the matter were to proceed to a hearing.

2. The mediator must be impartial (and must be seen to be impartial).

- 2.1 The mediator must withdraw from the mediation if they have a conflict of interest.
- 2.2 The mediator must inform the parties if they have any connection with the parties or the dispute which falls short of a conflict of interest, and withdraw if requested to do so by a party.
- 2.3 The mediator must avoid conduct that gives any appearance of partiality or prejudice.

3. The mediator must not give advice

If the parties require legal or other advice, the mediator should not give the advice because the parties can obtain it themselves, even though the mediator might be an experienced professional.

4. The mediator must inform participants that there is no obligation to settle

- 4.1 Although the parties might have been ordered to attend the mediation by the Tribunal pursuant to s88(2) of the Victorian Civil and

Administrative Tribunal Act 1998 (VCAT Act), any party or the mediator may terminate it at any time.

- 4.2 If the dispute fails to settle at mediation, the parties might be required to attend a hearing or a directions hearing shortly thereafter.

5. The mediation must be fair

- 5.1 The mediator must do everything in his or her power to ensure the mediation is conducted fairly.
- 5.2 If the mediator believes that a party is abusing the mediation process, or that there is a substantial power imbalance which will prevent a mutually acceptable resolution, the mediator may inform the parties of this.
- 5.3 Advocates, professional advisers and/or “support people” may attend unless the mediator believes their presence would make the mediation unfair. An unrepresented party will generally be considered to be acting reasonably in refusing to continue with a mediation where another party is represented, just as a represented party will generally be considered to be acting reasonably in refusing to continue with a mediation if another party is insisting that all parties should be unrepresented. However, a party who does not give the mediator the opportunity to resolve the issue of representation is acting unfairly. It is noted that under s62 of the VCAT Act, parties to a “proceeding” (which term includes a mediation) generally do not have an automatic right to representation.
- 5.4 The mediator must ensure parties have reasonable opportunities to consult their professional advisers if they wish to do so.
- 5.5 The mediator must avoid any conduct which could place a party under duress to reach a settlement.

6. Confidentiality

- 6.1 Section 92 of the VCAT Act provides: “Evidence of anything said or done in the course of mediation is not admissible in any hearing or before the Tribunal in the proceeding, unless all parties agree to the giving of the evidence.” (Section 92 does not apply in the equal opportunity jurisdiction; see Clause 26 of Schedule 1 to the VCAT Act).
- 6.2 The mediator must not reveal anything discussed in a private session to another party unless they have the express permission of the party who was present in the private session.
- 6.3 In accordance with s34(2) of the VCAT Act, a mediator must not directly disclose information about the affairs of a person acquired in

the performance of functions under or in connection with the VCAT Act. (There are limited exceptions in s34(3)(b) and s34(4).)

- 6.4 At the end of the mediation, the mediator must notify the Tribunal if the parties have agreed to settle (s90, VCAT Act) or if the Mediation has been unsuccessful (s91, VCAT Act).

7. Settlement

- 7.1 The mediator should encourage parties to make a written record of any settlement they reach and may make precedent agreements available to assist the parties in drafting their settlement terms.
- 7.2 In accordance with s93 of the VCAT Act, the Tribunal may make orders necessary to give effect to a settlement reached by the parties. If the mediator is a member of the Tribunal, the mediator may make the orders.

8. Immunity of mediators

- 8.1 Under s143(6) of the VCAT Act, a mediator has, in the performance of their functions as a mediator, the same protection and immunity as a member of the Tribunal. Under s143(1), a Tribunal member's immunity equates to that of a Judge of the Supreme Court.