



VICTORIAN BAR/COMMERCIAL DIVISION MEDIATOR REFERRAL SCHEME

The County Court Protocol on Court Referral for Nomination of Nationally Accredited Victorian Bar Mediators¹

Between

THE COUNTY COURT (Commercial Division)

And

THE VICTORIAN BAR

Contents

A. Purposes and overview of Scheme	2
Value of Mediation.....	2
Fair administration and integrity of the Scheme	2
Role of barrister mediators.....	3
Creation of Victorian Bar panels.....	3
B. Procedure for Referral Requests	3
Types of referral requests	3
Referral request by Court.....	4
Referral request by parties	5
Response to referral requests.....	6
C. Mediator's Fees	7
D. Feedback and review	8
E. Training/CPD	8
F. Contacts	8

¹ This document is intended for use by members of the Victorian Bar, judicial officers and staff members of the Court only, to explain how the Scheme will operate, commencing from # 2020.

A. Purposes and overview of Scheme

1. This Mediator Referral Scheme (**Scheme**) is a cooperative initiative of The Victorian Bar (**Bar**) and the County Court.
2. The Scheme's main purpose is to enable the Court to refer matters to mediation by Nationally Accredited mediator members of the Bar.

Value of Mediation

3. The Court and the Victorian Bar recognise the critical importance of mediation in facilitating the fair, proportionate and timely resolution of disputes. Mediation serves the public interest in the due administration of justice, improves access to justice and promotes legal equality and the principle of the rule of law.
4. Mediation is a structured negotiation process managed by an impartial person, the mediator. The mediator assists the parties to identify and assess options and to negotiate an agreement to resolve a dispute. Mediation is an alternative to a Court imposing a decision on the parties.
5. The Court has the power to refer proceedings to mediation under s66 of the *Civil Procedure Act 2010 (Vic)* (**CPA**). Parties and their practitioners are also required by the CPA to use reasonable endeavours to resolve their dispute, including through appropriate dispute resolution such as mediation.

Fair administration and integrity of the Scheme

6. This protocol gives better visibility and clarity to members of the Bar, Judges, Judicial Registrars, Court staff, practitioners and parties about how mediation services can be requested from the Bar by the Court. The protocol recognises that the success and sustainability of the Scheme requires that practitioners must be confident in its fair administration and integrity.
7. It is in the interests of the administration of justice and the efficient operation of the Scheme that referrals should be directed to barristers with appropriate experience. Referrals should also be fairly shared amongst available barristers.

8. The eligibility criteria and referral mechanisms contained in this protocol are established to facilitate the process for referring requests for nomination of appropriately qualified mediators by the President of the Bar (**President**), and to enable the President to nominate appropriately experienced available barristers.

Role of barrister mediators

9. All barristers participating in the Scheme are Nationally Accredited Mediators, independent lawyers and practising members of the Victorian Bar with experience in commercial litigation.

Creation of Victorian Bar panels

10. The Victorian Bar Office will identify barristers' areas of practice specialty and mediation experience and establish panels aligned to practice specialty and experience, so that requests for assistance from the Court can be matched to those panels.
11. Nationally Accredited Barrister Mediators have been invited to and have expressed interest in joining those panels.

B. Procedure for Referral Requests

Types of referral requests

12. There are three ways a referral request may be made:
 - a. Referral requests may be made directly by the Court.
 - b. Referral requests may be made by a party pursuant to a Court order.
 - c. The parties may agree to make a referral request, without an order of the Court.
13. In proceedings involving referrals which are urgent, or otherwise have unusual features, a person wishing to make a referral may telephone the Bar Office (Mr Travis McKay or Ms Jaclyn Symons) on 9225 7111, or the Chair of the Bar's ADR Committee (in 2020, Mr Tony Elder – 0417 542 166), to ascertain if the President is able to make a nomination in the circumstances required.

Referral request by Court

14. Where the Court (constituted by a Judge or Judicial Registrar) considers it to be in the interests of justice, it may refer a request to the President for nomination of mediators in relation to a proceeding.
15. The referral of a request for the President to nominate mediators will be sent by email to mediation@vicbar.com.au by the manager of the Commercial Registry or a Judge or Judicial Registrar's associate.
16. The email will:
 - a. have attached to it, copies of:
 - i. the current pleadings; and
 - ii. any order referring the matter to mediation;in the proceeding in respect of which the request is being made; and
 - b. include:
 - i. a brief (no more than 3 line), summary of the nature of the dispute in the proceeding²;
 - ii. whether there are any requirements that the mediation be held in a particular location, at a particular time, for a half or full day and whether in-person or online;
 - iii. the time within, or by which the mediation is to be held, whichever is the shorter;
 - iv. any unavailable dates of the parties in the specified time within which the mediation is to be held, or in the two weeks prior to the last date for mediation; and

² It is important to define a referral request with clarity. Refining the referral request in turn increases the ability and likelihood of the President of the Bar being able to refer appropriate mediators to the Court.

- v. any other details, information or material which a Judge or Judicial Registrar may direct.

Referral request by parties

17. The Court may make an order permitting or directing a party to make a referral request to the President for nomination of mediators in relation to a proceeding. For example, it is anticipated that an order permitting a referral request will be made in all proceedings identified by the Court as having a quantum of \$150,000 or lower (**lower value claims**). A standard order for lower value claims is in schedule 1.
18. A party may apply for an order permitting or requiring a party to make a referral request under this protocol by email to the Commercial Registry (commercial.registry@courts.vic.gov.au), copied to all parties.
19. The parties may also agree to make a referral request to the President of the Victorian Bar, without a Court order.
20. A referral request by a party is made by email to mediation@vicbar.com.au, copied to all parties. The email must:
 - a. have attached to it, copies of:
 - vi. the current pleadings; and
 - vii. any order referring the matter to mediation,in the proceeding in respect of which the request is being made; and
 - b. include:
 - viii. a brief (no more than 3 line), summary of the nature of the dispute in the proceeding³;

³ It is important to define a referral request with clarity. Refining the referral request in turn increases the ability and likelihood of the President of the Bar being able to refer appropriate mediators to the Court.

- ix. whether there are any requirements that the mediation be held in a particular location, at a particular time, for a half or full day and whether in-person or online;
- x. the time within, or by which the mediation is to be held, whichever is the shorter;
- xi. any unavailable dates of the parties in the specified time within which the mediation is to be held, or in the two weeks prior to the last date for mediation; and
- xii. any other details, information or material which a Judge or Judicial Registrar may direct.

Response to referral requests

21. When a referral request complying with this protocol is received by the Bar, the Bar will arrange for details of the referral to be circulated to appropriately experienced barristers on the relevant panel, to check if they have any conflicts of interest and to ascertain their availability to undertake the mediation.
22. The President will nominate (**nomination**), by email to the person making the request (**the requestor**), at least 3 (if possible), and not more than 5 nationally accredited mediators who are available to conduct the mediation in the time specified and whom the President believes have relevant practice specialty and appropriate experience to conduct the mediation:
 - a. in the case of a proceeding in which mediation is to be held within 2 weeks of the request, the nomination will be made within 1 business day (or such other time as may be agreed), of the request being received by the Bar; and
 - b. in the case of a proceeding in which mediation is to be held by a date which is more than 2 weeks after the request, the nomination will be made within 5 business days (or such other time as may be agreed) of the request being received by the Bar.
23. A nomination will include the names, email addresses and telephone numbers of the nominated barristers, with a link to their profile pages.

24. On receipt of a nomination:

- a. if the requestor was the Court, the Court will appoint one of the nominated mediators to conduct the mediation and the Court will make an order generally in the form of Schedule 2; and
- b. if the requestor was a party, the parties must agree and appoint one of the nominated mediators as mediator. If agreement is unable to be reached, the parties may request a determination from the Court by email to the Commercial Registry (commercial.registry@courts.vic.gov.au) copied to all parties.

25. Within 2 business days of a barrister being appointed to a mediation, the requestor must notify the Bar of the appointment, by email to mediation@vicbar.com.au

C. Mediator's Fees

26. Mediator's fees for mediations conducted pursuant to this protocol will be for a capped fee for up to 7 hours of mediation conducted on one day, with up to 1.5 hours of preparation:

- a. in the case of a proceeding in which the quantum of the dispute exceeds \$150,000, or for which mediators from the more experienced panel are expressly requested by the Court or the parties, \$4,400 incl GST; and
- b. in the case of lower value claims, \$2,500 incl GST.

27. Mediator's fees for mediations:

- a. extending into a second or further day, will be at the same daily rate; and
- b. which exceed 7 hours on one day, may incur an additional hourly fee up to 10% of the daily fee for each additional hour after the first 7 hours.

28. A mediator is not compelled to extend a mediation beyond 7 hours on any one day, or to extend into a second or further day.

29. It is the responsibility of a barrister who accepts a nomination to ensure that they or their clerk receive payment of the mediation fees and any other costs associated with the mediation. The Court will not be liable for payment of mediation fees or other costs associated with the mediation.

D. Feedback and review

30. The Court will keep a record of the referral requests made or ordered by the Court each quarter, the number of appointments made and the barristers appointed.
31. For the purpose of monitoring the Scheme's success, the Court will also keep a statistical record of the number of mediations resulting in resolution of a proceeding and of those which don't result in a resolution. The Court also welcomes any feedback from barristers and parties as to their experience of participating in the Scheme and suggestions for how the Scheme may be improved in the future. Any such feedback should be provided to the Commercial Registry (commercial.registry@courts.vic.gov.au) and the Victorian Bar Office.
32. The Court will provide such feedback to the Victorian Bar Office about the operation of the Scheme as may reasonably be requested.
33. Barristers conducting mediations under the Scheme may be requested to answer a short survey for the Victorian Bar to assist in its assessment of the operation of the Scheme.
34. The Court and the Victorian Bar will review the operation of the Scheme annually. The review will assess the success of the Scheme, its future viability, mediator's fees and areas for improvement and any need for revision to this protocol.

E. Training/CPD

35. The Victorian Bar will publicise the launch of the Scheme and provide interested barristers with an overview of its operation.
36. CPD session/s will include representatives of the Court and nationally accredited barrister mediators.

F. Contacts

37. For the purposes of the day to day operation of the Scheme, any queries should be directed to:

Victorian Bar
ADR Co-ordinator
The Victorian Bar
205 William Street, Melbourne, VIC 3000
T 03 9225 7111 | E mediation@vicbar.com.au

County Court of Victoria
Commercial Registry Manager
commercial.registry@countycourt.vic.gov.au

DATED: September 2020



HIS HONOUR JUDGE WOODWARD

ON BEHALF OF THE COMMERCIAL DIVISION OF THE COUNTY COURT OF VICTORIA



Wendy Harris QC

Victorian Bar President

ON BEHALF OF THE VICTORIAN BAR COUNCIL

Annexure 1

**IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION – [] LIST**

PROCEEDING NO:

PLAINTIFF:

DEFENDANT:

BEFORE:

TYPE OF ORDER:

DATE OF ORDER:

OTHER MATTERS

- A. This proceeding has been identified by the Commercial Registry as a lower value claim (likely quantum of no more than \$150,000) for which expedited procedures and reduced fee mediation are appropriate.
- B. The parties and their practitioners are reminded of their obligations under the *Civil Procedure Act 2010 (Vic)* and in particular their obligations in relation to proportionality. The Court expects that parties will cooperate and communicate with each other in accordance with those obligations with a view to resolving this dispute as expeditiously and proportionately as is possible consistent with the interests of justice. Adverse costs orders may be made at the conclusion of the proceeding if the Court finds that there has been a failure to comply with these obligations.

ORDERS

Mediation

1. The Court has identified the proceeding as a lower value claim for which reduced fee mediation by a barrister mediator nominated by the Victorian Bar is appropriate.
2. By the date specified in part 1 of these orders, the parties are required to discuss the procedures for mediation; and either:
 - a. agree on a private mediator and date for mediation; or
 - b. agree to make a referral request to the Victorian Bar.

3. A referral request may be sent by the plaintiff by email to mediation@vicbar.com.au, copied to all parties. The email must:
 - c. state that the proceeding has been identified by the Court as a lower value claim for which reduced fee mediation is appropriate;
 - d. have attached to it, copies of:
 - i. the current pleadings; and
 - ii. this order;
 - e. include:
 - i. a brief (no more than 3 line), summary of the nature of the dispute in the proceeding;
 - ii. any requirements that the mediation be held in a particular location, at a particular time, for a half or full day and whether in-person or online;
 - iii. the time within, or by which the mediation is to be held, whichever is the shorter;
 - iv. any unavailable dates of the parties in the two weeks prior to the last date for mediation; and
 - v. any other details, information or material which a Judge or Judicial Registrar may direct.
4. If a referral request is made, the parties are to discuss and agree on the mediator to be appointed to conduct the mediation. If no agreement is possible, the plaintiff must forward the list of nominated mediators to the Commercial Registry (commercial.registry@countycourt.vic.gov.au), copied to all parties, with a request for the Court to nominate a mediator.
5. The cost of the mediation is to be shared equally by the parties.
6. The plaintiff must provide to the mediator or mediators as soon as practicable after appointment:
 - a. a copy of this order;

- b. a copy of the current pleadings and particulars;
 - c. any other key documents which are necessary for a mediator to understand the dispute.
7. Subject to the next order, the mediation must be attended by the people who have the ultimate responsibility and authority for deciding whether to settle the dispute and relevant legal practitioners, being (where applicable):
 - a. the parties themselves, or a representative of a corporate party with full authority to make all decisions relating to the conduct of the proceeding, including to settle the proceeding;
 - b. the legal practitioners for the parties with primary responsibility for the conduct of the proceeding and advising the parties in relation to the proceeding and its settlement (including trial counsel, if retained); and
 - c. any other person who is likely to be required to approve the settlement (such as insurers or litigation funders).
8. The mediation may be attended by video-conferencing application with the prior approval of the mediator.
9. Failure to comply with the above orders may lead to adverse costs orders being made against the defaulting party.
10. Within 7 days from the conclusion of the mediation, the mediator is to be required by the parties to email the Commercial Registry (commercial.registry@courts.vic.gov.au) stating:
 - a. the name of the mediator;
 - b. the proceeding number and party names of the proceeding;
 - c. the date the mediation was conducted; and
 - d. whether the proceeding has settled in full; settled in part; or not settled.