

Resolving Business Disputes: A guide to mediation



Small
Business
Commissioner

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ACKNOWLEDGEMENT OF COUNTRY

We acknowledge and pay our respect to the traditional custodians of the lands and waters of NSW, and all Aboriginal Elders, past, present and emerging.

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MESSAGE FROM THE SMALL BUSINESS COMMISSIONER

Getting into a dispute can at times be an unavoidable part of running a business, whether it be with a supplier, a customer, your tenant or landlord.

Unfortunately, disputes can be difficult to resolve by yourself. Understandably there are often strong emotions involved and it can be difficult if not impossible to even talk to the other party. It's also easy to lose sight of what you are trying to achieve.

Mediation can be a highly effective and efficient way to resolve disputes. It is almost always cheaper and quicker than going to court or a tribunal. In fact, over the long term the overwhelming majority of disputes the Commission deals with are resolved before the need to take this route.

Mediation helps the parties communicate with each other when communication is difficult. It helps people focus on finding a solution that both parties can accept. There are costs to a long, drawn-out dispute, especially if it ends up in court and mediation helps the parties to a dispute weigh all the considerations so they can understand the best outcome for them.

I encourage you to review the content of this guide and make enquiries regarding how mediation may help you. Please avoid unlicensed or unqualified individuals who often represent themselves as specialists or experts in mediation.



The Commission is highly experienced at helping to resolve even the most difficult disputes. Our mediators are qualified and accredited professionals, dedicated to bringing parties together and overcoming roadblocks to find a solution.

This guide explains how the mediation process works and how it helps to resolve disputes. It is aimed at those about to go through mediation, or those considering whether they should. It will also provide useful guidance and tips for those who just want an expert insight into how to resolve a business dispute.

Chris Lamont
NSW Small Business Commissioner



A better way to resolve disputes

The mediator.

It is a fact of life that business dealings and relationships can lead to disputes.

Contracts regularly strike trouble when something unexpected happens, or when one side doesn't think the other has delivered what was promised. Maybe you are a subcontractor who remains unpaid for work by a builder. Perhaps you are in conflict over a lease for an office, restaurant, shop or industrial site.

Problems when doing business can also arise from events beyond your control. These could be anything from supply chain issues to market changes, loss of key personnel or even a global pandemic.

These situations can be stressful, frustrating and time-consuming. If you are reading this guide, you may be facing the difficult choice of:

1. doing nothing and waiting to see if things get better
2. trying to negotiate with the other party yourself
3. going to court to seek a legal judgement
4. using a mediator to try to settle the issue early and out of court.

This guide focuses on using a mediator to try to settle the issue out of court. Mediation involves using a neutral third party to help you reach an agreement with another person or business entity as quickly as possible. The NSW Small Business Commission offers a cost-effective and confidential mediation service. (For more information, see pages 9-10 of this guide).

Mediation is usually the best way to resolve a dispute. It is a fast and flexible approach and available for all civil matters involving businesses. The mediator provides a much-needed circuit-breaker by speaking to the parties, either in person or via videoconference.

As early as possible, the mediator will help everyone find a solution they can accept, without having to pursue litigation through the courts.



Common questions



How much does mediation cost?

It costs nothing for you to apply for mediation with the NSW Small Business Commission, and there are no costs for speaking to our office. If a mediator is appointed and a date agreed, each party will be asked to pay a share of the cost. Current costs are available online at www.smallbusiness.nsw.gov.au.



Do I need a lawyer?

Although lawyers are not required in the mediation process, their support can be helpful. Obtaining legal advice is often recommended. You will know in advance whether the other party is represented by a lawyer.



Who can appoint a mediator?

The Registrar of Retail Tenancy Disputes (sitting within the NSW Small Business Commission) is the only person in NSW who can appoint a mediator for a retail tenancy matter. For other types of disputes, the parties can agree to use our mediators or seek out private mediators. If a dispute has already gone to court, the judge may appoint a mediator.



Can I use an interpreter?

As a NSW Government service, the NSW Small Business Commission will provide qualified interpreters at no cost. Parties can also engage their own support teams.



Will the mediator make me give up my rights, or cut my claim in half?

No. If a settlement is possible in your dispute, the mediator will help you find it as quickly as possible. If no agreement can be reached, you will also know this at an early stage, and can pursue your rights in full as normal.



It's not too late to mediate!

A mediator can help even during a court proceeding.

In certain types of disputes, you must be able to show that you have tried to resolve your dispute by mediation before a court or tribunal will hear your case. Mediation is required under NSW law before a court will consider a case that involves retail leases, for example. Many commercial contracts also contain dispute resolution clauses requiring the parties to use mediation if a dispute arises.

Any party at any stage can contact the NSW Small Business Commission and its Mediation Services team about what to expect of the mediation process.

The mediator will help identify all relevant issues and options, and seek to find areas of agreement between the parties. If a settlement is reached, the details will usually be recorded in writing and signed jointly before the mediation session ends. When you have reached a

satisfactory conclusion the parties should enter into a binding written arrangement, such as a deed. (For more information, see page 19 of this guide).

Mediation can also occur when commercial litigation is already underway, such as in contract matters. Here, the judge, magistrate or tribunal member typically orders a pause in proceedings so everyone can try to sort out their differences in private. If an agreement is reached, the parties can request it be recorded and made enforceable as part of the court's orders.

Finally, mediation can even occur after a court has made its decision. Although less common, this happens where there are still outstanding points of contention. A mediator can help sort out these issues, allowing both parties to move forward.



Common questions



Can mediation ever be compulsory?

Yes. Mediation may be required under the *Retail Leases Act 1994* (or other legislation). It can also be compulsory due to a court order or direction, or as part of a contractual agreement.



Is a mediation agreement binding?

Yes. Just like any agreement, both parties are bound by the promises they make. It is best to have a written record, and in many cases, parties will record their obligations in a deed. Both parties may also agree to a 'mutual release', in which they commit not to take any further legal action.



What happens if someone doesn't keep their side of an agreement?

The agreement can be enforced, just like any other agreement, by going to court if one party doesn't comply. But remember that compliance is much more likely following mediation, since the parties have already used a mediator to help them agree on terms.





Understanding the benefits

Five advantages of using mediation to resolve your dispute.



Speed:

Using a mediator is much faster than going to court. If you and the other party reach an agreement, it is best to put it in writing and sign immediately. This effectively becomes a legal contract and is enforceable. (In the rare situation where one party fails to comply, it is possible to obtain enforcement through a court order). By contrast, if a case goes to court, it usually takes many months to gather evidence and prepare for multiple hearings. A court judgement may then have to be enforced through other processes, involving even more time.

Cost:

Mediation helps avoid the heavy expense of preparing for and appearing in court. The major cost in any court process will be lawyers, barristers, and expert witnesses, who typically charge by the hour. The unsuccessful party in court can be further penalised by a judge's order to pay the winner's legal costs. A mediated settlement avoids most of these costs, and the parties can agree on who pays for whatever costs do arise. Even if you end up in court after an unsuccessful mediation attempt, it is likely that you and the other party will have significantly narrowed down the issues in dispute.



Flexibility:

Mediation gives you more control over how a dispute is handled. A session can be scheduled at a time and location that suits both you and the other party. Rather than have a solution imposed by a court based on a narrow set of legal issues, the parties can decide what to do while looking at the commercial situation in full. Agreements reached through mediation can include practical remedies and personal outcomes – not just purely legal ones.



Confidentiality:

Unlike court hearings, mediation remains private and is not open to the public. If a dispute goes to court later, anything said or produced during the mediation session cannot be used as evidence. You also have the option to privately share information with the mediator that can help guide the conversation. This information will not be passed on to the other party without your consent.

Satisfaction:

Mediation is a less formal and adversarial way to resolve disputes. This can be important when you want to limit personal stress and anxiety, and if you want to maintain a professional relationship with the other party. Simply talking through the situation can help parties understand each other's perspective. This calms things down, allowing everyone to refocus on the future.





The role of the NSW Small Business Commission

A neutral, confidential service for resolving disputes.

The NSW Small Business Commission is an independent statutory agency, established by the NSW Government. We provide a neutral, confidential mediation service for retail tenancy disputes and other commercial lease arrangements. We can also help resolve other types of business disputes.

Mediation is also available for matters involving:

- small businesses and government agencies (including local councils)
- contractors and subcontractors
- franchisors and franchisees
- motor vehicle repairers and insurance companies
- motor vehicle manufacturers and distributors.

Trained and accredited as part of the National Mediator Accreditation Standard system, our mediators can help find options when a party to a contract is unable to fulfil commitments or make payments. Personalised support is also available to those facing potential insolvency and bankruptcy.

As noted earlier, if you have a retail lease dispute, it is compulsory under NSW law for you to engage us before going to court.



How to get help through mediation

Talk to us about the situation.

If you think you will need a mediator, the first step is to get in touch with us before filing an application.

Contacting the NSW Small Business Commission's Mediation Services team is simple.

Any party to a dispute can approach us directly or encourage the other party to do so. A lawyer, agent or other legal representative can also get in touch with us on behalf of their client or principal. You can even ask the other party for permission to receive a call from us, and then send us their contact details.

An application for mediation should tell us who you are (the applicant) and who the other party is (the respondent). It should also provide basic information about the problem or dispute. We will only need key documents to start with, such as the lease or contract.

There is no application or filing fee.

An officer from the Mediation Services team will be assigned to your dispute. The officer will contact both parties to discuss the process and answer any questions. Our active case management approach offers every opportunity to resolve the matter, even before formal mediation begins.

If your dispute cannot be resolved at an early stage, we will offer a date when a mediator is available. For standard matters, the Small Business Commission aims to offer a date within five weeks of the application being processed. For urgent matters, a mediation session can be arranged within days. In all cases, we aim to set a date and time that works best for all parties.



Common questions



Is the NSW Small Business Commission my only mediation option?

For retail lease matters you must have a mediator appointed by the Registrar of Retail Tenancy Disputes (which sits within the NSW Small Business Commission). For other matters, you may be able to choose a private organisation or individual mediator, but you can still contact our office for further advice.



Do your Mediation Officers provide legal advice?

Mediation Officers will offer procedural advice and strategic guidance to both parties equally and without favour. In NSW, only legal practitioners – who are obliged to act only in the interests of their client – can provide legal advice.



What if I'm based in a regional area?

Anyone anywhere in NSW can access our services.



Common scenarios

When going to court should be a last resort.

I haven't been paid by another business for a job I've completed. What can I do?

If you are unable to start a conversation with the other party and negotiate a mutually agreeable outcome, you should contact our Mediation Services team. A Mediation Officer can help you to understand your options in a confidential environment.

The owner of my shop premises won't carry out a repair. What can I do?

You may need to understand what repair obligations you have under the lease, and what the landlord has agreed to. Retail and commercial leases are often very different to residential leases. Our Mediation Services team can assist all parties – including real estate agents, property managers or legal representatives – to understand how best to resolve the issue. Remember that parties to a retail tenancy dispute are required by law to attempt mediation before going to a court or tribunal.

I'm behind on rent and have been locked out of my tenancy or issued with a termination notice. What can I do?

Falling too far behind on rent payments is likely to be a fundamental breach of your commercial or retail lease. There is usually a 'grace period' set out in the terms of the lease that allows a certain number of days before you are locked out of the premises, so it's a good idea to check your commercial contract. Deliberately withholding rent is risky without an agreement or court order, even when the parties are in dispute. You should consider seeking legal advice and contact our Mediation Services team to discuss the options available to both parties.

I'm about to give a tenant notice to vacate the commercial property I own, but I'm concerned they won't leave in time. What can I do?

If the fixed term of the lease has expired, the tenant can continue to trade on a holdover or month-to-month basis. If the property owner wishes to reoccupy the



premises, the lease should specify a notice period. For retail leases, there may also be a notice requirement that applies under that law, regardless of what the lease says. If the tenant would like to stay on for longer, their options would include trying to negotiate for an extension while they relocate or wind up the business, or making an offer to re-sign for another fixed term. Either party can contact our Mediation Services team for further advice.

I've sold a faulty product to a consumer, but the manufacturer or distributor will not engage with me. What can I do?

Court action against a supplier, manufacturer or distributor is usually a last resort, particularly if this relationship is vital to your overall supply chain. Negotiation, and potentially mediation, are likely to be the best options to resolve the issue. Contact our Mediation Services team for further advice.

I'm a building and construction subcontractor working on a government project and a dispute has arisen. What should I do?

If the issue you're experiencing can't be resolved through communication or any dispute resolution clauses in the contract, you may have several options. These include mediation; adjudication through the *Building and Construction Industry Security of Payment Act 1999* (NSW); and obtaining legal advice and going to court. Contact our Mediation Services team for help.



How to prepare for mediation

Tips to get the most out of your session.

Consider what is most important to you.

By engaging a mediator, you and the other party are making a genuine effort to reduce anxiety, stress, and expense – and achieve a better outcome. So, consider what matters to you in resolving this dispute and what doesn't. Are you trying to minimise costs? Obtain an apology? Or to simply sort out an issue so you can shake hands and go your separate ways, or continue a business relationship? Next, you should consider what is important to the other party, and if their interests mirror yours. Going through this process beforehand will help you communicate effectively during the mediation session.

Gather any key documents.

It's a good idea to collect any documents that the other side might need to see before mediation begins. This will help you avoid having to adjourn the session just so you can fetch more information. It will also allow you to make the most of your time with the mediator. Having the main records on hand will provide clarity and certainty throughout the process.

Have other support available.

There may be other key people that you would like to be involved in any decision making, at least by phone or video chat, if not in person. If you think you will need an interpreter, you should organise one in advance. Bringing a legal adviser can also be an option. The Mediation Officer assigned to your dispute can help both parties understand who will be in attendance and resolve any issues ahead of time.

Common questions



Does the other party also need to file for mediation?

No. Only one party needs to apply, and a Mediation Officer will contact all other participants.



Can I withdraw an application for mediation?

Yes. It is common for the matter to be resolved prior to the formal appointment of a mediator. Our process is designed to give the parties every chance to settle as early as possible.

What happens during mediation?

The process of facilitating an agreement.

Mediation is a flexible form of dispute resolution.

Most sessions start with the mediator welcoming the parties and other representatives who may be present in the room. The mediator explains the process they intend to follow and seeks to gain agreement on some ground rules. Both you and the other party will have the opportunity to briefly summarise what led you to this point, and to identify what you believe to be the relevant issues.

The mediator will play a constructive role by framing the conversation, posing questions, encouraging discussion, and offering new ways of looking at the situation. It is common for the mediator to meet with the parties separately during the day. Both you and the other party can take breaks and discuss the matter privately with others, including legal advisers. It is the duty of all parties to the mediation to participate in good faith and observe the agreement to keep everything confidential.

During the session, the mediator and the parties will typically generate and discuss ideas to resolve the matter. There may be several options that satisfy the interests of both parties. Participants will be encouraged to test the consequences of all potential solutions, as well as the likelihood they will be able to honour any commitments made. The mediator can also help the parties compare potential settlement options against the risks of pursuing the matter all the way through to a court proceeding.

The session will continue until the matter settles or it becomes apparent that the parties will be unable to reach an agreement on that day. Further mediation sessions can be scheduled if necessary.



Common questions



Where will the mediation be conducted, and do I need to attend in person?

For lease matters the NSW Small Business Commission will offer to conduct the mediation in a suitable location that is close to the premises in dispute. We can support online and hybrid attendance (in person and by video). This is negotiated with the parties after you submit an application to us.



Should I bring a lawyer – and what if I don't but the other party does?

Obtaining legal advice is recommended in most cases. Lawyers represent clients in about half of the matters we run. The parties can agree in advance to try the process without lawyers present.



Can I bring a support person?

Yes, but they will need to sign a mediation confidentiality agreement.



How long will the mediation session last?

A mediator will usually need three to five hours to run the process, although complex matters may take longer. Time extensions or subsequent sessions are usually discussed after four hours. The parties may also need to adjourn so they can obtain further information or advice before continuing.



Next steps

What happens when you reach agreement – or don't.

A mediator can help you settle the dispute in full or in part. In other situations, no settlement is possible.

If an agreement has been reached, the parties will be encouraged to make a written record that is legally binding and enforceable. This will help both parties to fulfil any obligations, as well as have a shared understanding of what cannot or should not be done. If court proceedings were already underway, the parties can then notify the judge or magistrate that the matter has settled.

Perhaps the mediation may be inconclusive but offers to settle remain on the table. If so, the parties may make notes to consider in private, with a clear understanding of any deadlines.

If no agreement is reached on the day, either party may request a certificate or letter stating that the mediation

attempt was unsuccessful. This is particularly relevant in disputes over retail leases where the parties must show compliance with NSW law.

But remember – even if you are unable to reach agreement, the very process of discussion can clarify what is important and relevant in your dispute. It can also reveal what issues are not worth spending further time, energy and money on. Mediation can always resume if more information emerges. There may be further opportunities to find a settlement as time goes on.

As always, you may have to balance whether making or agreeing to an offer is better than the cost and uncertainty of court action.



Case studies

How a Sydney gym negotiated a rent reduction.

Andrew* was forced to shut down his Sydney gym when COVID first hit in March 2020. As gym memberships were being frozen during the lockdown period, he was also worried about a 100 per cent reduction in turnover and having to let many of his trainers and other staff go.

To mitigate this, Andrew quickly reassessed his business model and switched to an online fitness offering. But even with rapid uptake, he was still unable to meet the terms of his lease on his gym premises.

Suffering an 80 per cent fall in sales, Andrew sought to negotiate a rent reduction with the landlord, a small property owner who had substantial debts. The property owner was reluctant to help as he had not received any mortgage relief. However, he understood that both parties had to share the financial risk and cash flow impact of COVID-19, and therefore initially provided a three-month rent waiver.

After a three-month forced closure, Andrew was able to reopen, but at reduced capacity. After several months of restricted trading, the business also had to absorb the cost of having a dedicated hygiene marshal on duty at all times.

In July, Andrew approached the landlord for further relief, but was declined. Both parties agreed to mediation, understanding that it was compulsory for them to undertake mediation before pursuing claims in the civil courts.

On the day of the mediation session both parties were nervous. The mediator gave them both the opportunity to discuss the matter and air their grievances. At first, both parties refused to budge. Andrew wanted a waiver of his rent. The landlord was hesitant as he doubted the accuracy of Andrew's financial statements.

After two hours, the mediator adjourned the mediation for two weeks to give Andrew the opportunity to obtain further evidence of his decline in turnover.

During the second mediation session, the mediator was able to help both parties understand each other's financial position and assist in identifying options that suited them and would not have been available under the regulated guidelines. By the end of the mediation process, both parties were relieved to have resolved the dispute and have a degree of financial certainty.



A profitable partnership survives a crisis

Bhanu*, a doctor and shareholder in a medical practice, was concerned when he saw several transactions in the company bank accounts that he had not authorised, adding up to around \$20,000. He found out that two companies, each owned by other doctors in the practice, had been invoicing for services that Bhanu was unaware of.

He felt cheated by his colleagues, and was concerned not only about the money, but about whether the medical practice could continue at all.

Although Bhanu could have pursued the matter in court, and explored what the corporate regulator could do, he also wanted to keep working in what was still a profitable practice.

Wisely, Bhanu first tried mediation.

With the help of the mediator, the other doctors were able to explain that as they were majority shareholders, they were entitled to make these sorts of decisions on behalf of the business. When they had to change how they were operating during COVID-19, their individual companies provided valuable support to the shared practice.

Bhanu was able to understand their thinking and accept an apology from the other partners in the practice. Through mediation, the other doctors realised that their strategy appeared to be an unfair distribution of profits. But Bhanu was also able to see the benefit of outsourcing critical services quickly during a crisis.

Finally, they made an agreement that saw an adjustment in the distribution of profits, and ensured that the successful business (making around \$500,000 in a year) was able to continue for the benefit of all.



Finding your way through the hills and valleys of commercial relationships

Danika*, a landscaper, had an agreed scope of work on a property outside of Sydney, with time and materials to be paid for progressively.

She loved the location, got on well with the family that owned it, and it was a big job that was going to keep her busy for months.

Even better, the family gave her work on another property they owned and referred her to another new client.

But with \$16,000 owing at the end of job, and excuses piling up about when she could expect a final payment, she started thinking about mediation.

During mediation the property owners were able to raise an issue with a second job that Danika had started working on for them. She admitted that she had made a mistake that had cost them \$2000 to repair. But the family also had the opportunity to reassure Danika that they valued her creativity and expertise.

The mediator facilitated a discussion around a verbal agreement to a \$3000 discount if Danika was able to land a big job with a new client they had introduced – which Danika was able to do.

The mediation process also helped them the family to be able to sensitively discuss some cash flow issues in their own business, making a lump sum payment difficult for them.

The mediator was able to help the parties manage all of those important conversations, and assist both parties to weigh up her options. Danika agreed that it was better to discount her final bill and accept instalments over time.

When a good relationship turns bad over money, it can be very difficult for both parties to communicate effectively. A mediator will help to address the emotion and focus on what is important in getting the best possible commercial outcome for everybody.



Mediation resolves a lockout, even after court proceedings initiated.

Diana*, a commercial tenant could not keep up with rent and outgoings after two years in the premises. The landlord locked her out in July, and in August sued in the Local Court for \$64,000, plus ongoing costs until the loss was fully realised.

In November, before the case got to court, the parties agreed to participate in mediation. The landlord accepted \$40,000 from Diana as a full and final settlement, with a deposit upfront followed by smaller payments over three years.

In addition, chattels of value (mostly commercial-grade appliances) became the property of the landlord, to sell

or offer to a future tenant. The only exception was a rare collection that held sentimental value for Diana. She agreed to re-enter the premises and fully make good by December, and a consent order was entered to finalise the Local Court proceedings.

With deals like this being done months after the lockout, it is clear the dispute could have been resolved even earlier had the parties pursued mediation as a first option.

An early referral to mediation is always a good idea, but just because court proceedings have been initiated doesn't mean it's too late.

We won't release the bond, because ... aren't you still the tenant?

Anthony*, a property manager, was surprised to hear that the tenant was claiming back the bond on a commercial space. Anthony was pretty sure the shop was still in business and doing well.

After trying and failing to communicate with the person listed on the lease, Anthony froze the bond payment and quickly applied for mediation. His best guess was that the tenant had sold the business without properly transferring the lease, perhaps assuming that the sale did not have to involve the landlord.

During mediation, it emerged that the tenant was simply unaware of what was required to transfer the assets of a business effectively and securely – as was the purchaser of the business.

After working through the problem in the non-adversarial environment of mediation, all parties were happy to make the sale work. The bond payment was resolved, as was a separate deal with the purchaser to ensure they could continue to operate in the space under a fixed-term lease.



A place to discuss the real issues and repair broken trust.

Nisha*, a commercial tenant, had been complaining that her lessor Trent* wanted to go back on his word. She claimed that Trent had ripped up the rent waiver agreement they entered at the beginning of the COVID pandemic and was forcing her out of business.

Tensions escalated during mediation. Trent accused Nisha of misleading him on her trading figures, which were the basis he had agreed to waive her rent.

In a private session with the mediator, Trent admitted to being upset because he had found out Nisha was looking for other properties. Trent had agreed to the rent waiver because he wanted to have guaranteed funds coming in to pay his mortgage. He felt betrayed by Nisha.

In her own private session with the mediator, Nisha revealed that she would lose her house if Trent called in the security deposit on her commercial space. This, in addition to finding out she was pregnant, had led Nisha to withhold her trading figures, and to instead look around for other options.

Nisha wanted to continue to run her business and pay as much rent as she could afford. Trent did not want to see Nisha lose her home.

Discussing the real underlying motivations at play helped restore trust between the parties. They were able to reach an agreement that accommodated both of their situations.

How to fix a leaky roof – and a tenancy dispute.

Seemingly small issues – like a leaky roof – can easily spiral out of control. And sometimes it can take a mediator to patch things up.

Alex*, a commercial tenant, had complained to the real estate agent that water was dripping from the ceiling. The upstairs tenant's leaking dishwasher outlet was sending a trickle of water into Alex's commercial kitchen downstairs.

This became an urgent problem for Alex when a food safety inspector advised that his business would be shut down due to the leak. To make matters worse, Alex

had already been behind in rent payments before COVID and was also struggling due to the pandemic conditions. He had also just missed his deadline to exercise an option for a new fixed-term lease.

Three weeks after notifying the agent of the leak, Alex was ready to sue, but instead pursued mediation on the advice of his lawyer.

Both parties wanted the tenancy to continue, so they agreed to a resolution that addressed the pre-pandemic rent, the COVID-affected rent, the terms of the next fixed-term lease – and the leaky roof.

* All names have been changed.



Viewpoint

Daniel Massey, a mediator for the NSW Small Business Commission, explains why mediation is more helpful than using lawyers and going to court.

"I'm a solicitor, a sole practitioner, and have been working in mediation since 1991, including the last four years with the NSW Small Business Commission, on its external mediation panel. I think it's a great service that the Commission offers to the public – it's cheap and it's efficient.

I've been extremely busy in the past year. In November 2021, I did 14 mediations in just 20 business days, all COVID-related lease disputes.

I became a mediator because I had seen how useful it was in disputes when I was acting for clients in the construction industry. I also think the money that's spent on litigation is often wasted money. What litigation does is keep the parties apart as opposed to bringing them together in an environment where they can have a bare-bones talk about the issues.

If you have spent a lot of money on legal fees it can be a disincentive to settlement. And if the parties in a dispute are only communicating by sending letters through their lawyers, it can also just dig them further into their positions.

In a mediation, I try to get the parties actually talking directly to one another rather than through their lawyers. Most people still bring a lawyer, though it's not compulsory.

When you talk to the parties, you find out what's really important to them. Often people will tell the other side things about their situation that might be nothing to do with the law or the strict application of the regulations. But those things can have a real impact on how a landlord looks at the tenant, for instance.

At the end of the day, it's the two people in dispute who have to decide to settle, not their lawyers."



Things to remember

Your choices in any dispute fall into four categories:

1. do nothing and wait to see if things get better
2. try to negotiate with the other party
3. use a neutral third-party mediator to help both parties find an early settlement
4. go to court

Five advantages of using a mediator

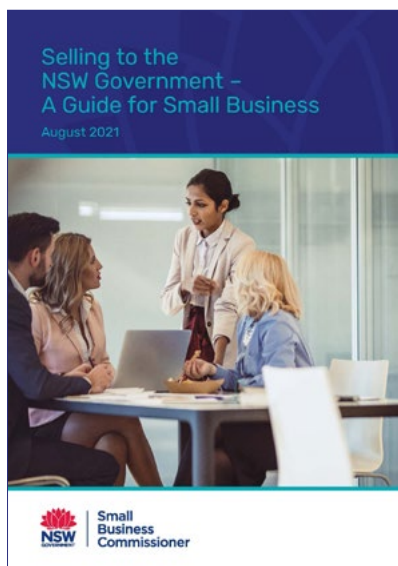
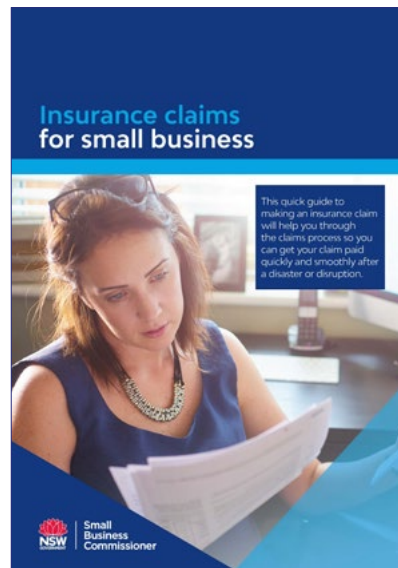
1. **Speed:** Using a mediator is much faster than going to court.
2. **Cost:** Mediation helps avoid the heavy expense of preparing for and appearing in court.
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4. **Confidentiality:** Unlike court hearings, mediation remains private and is not open to the public.
5. **Satisfaction:** Mediation is a less formal, aggressive, and adversarial way to resolve disputes.

Mediation is available to:

- Parties to a retail tenancy dispute under the *Retail Leases Act 1994*
- other commercial leasing disputes
- small businesses and government agencies (including local councils)
- contractors and subcontractors
- franchisors and franchisees
- motor vehicle repairers and insurance companies
- motor vehicle manufacturers and distributors.

We can take applications from sole traders, directors of companies, people employed in the business, agents, and other legal professional or other advisors.

Other guides from the NSW Small Business Commissioner



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