

Operational Guidelines

Determining whether a party to a dispute has unreasonably refused to participate in alternative dispute resolution (ADR) so that a certificate may be issued under s 12(3) of the *Small Business Commission Act 2017*

Note: These *Guidelines* are subject to change from time to time. These *Guidelines* are current at 1 July 2017.

Purpose

These *Guidelines* outline the process followed by the Victorian Small Business Commissioner (VSBC) in exercising her power to certify that a party to a dispute has unreasonably refused to participate in alternative dispute resolution (ADR) under the *Small Business Commission Act 2017* (Act).

Such certificates may be admitted in evidence before the Victorian Civil and Administrative Tribunal (VCAT) or a court. Details of these certificates may also be published in the VSBC Annual Report. This Report is tabled in Parliament.

Application

These *Guidelines* apply to applications lodged with the VSBC under the Act on or after 1 May 2014.

Context

A key role of the VSBC is to provide ADR services to small businesses in disputes with other businesses and with public entities, public service bodies, Councils, non-profit organisations, professional associations, educational institutions, industry bodies and certain special bodies within government. These disputes relate to unfair market practices and commercial dealings. ADR seeks to resolve the dispute through preliminary assistance or mediation that has been arranged by the VSBC.

Resolution of disputes through ADR avoids the cost and other adverse consequences of litigation. The VSBC 'Avoid the Costs of Litigation' Information Brochure, available at www.vsbcc.vic.gov.au, provides results of a survey of businesses involved in litigation.

A subsidised fee is payable by both parties for VSBC mediation services. Refer to the VSBC *Guide to Mediation* for more information, available at www.vsbcc.vic.gov.au.

The VSBC does not deal with complaints that are trivial, vexatious, unlikely to be resolved through ADR or which could be more appropriately dealt with by a public entity, public service body or some other person.

To assist the VSBC perform the role of providing ADR, the Act provides a range of powers, including to:

- issue certificates certifying that a dispute is unlikely to be resolved by ADR, or that ADR has been attempted but has been unsuccessful (s 12(1));
- issue certificates certifying that a party has *unreasonably* refused to participate in ADR (s 12(3)); and

- publish details of certificates issued for unreasonable refusal to participate, specifically the name of the parties which unreasonably refused to participate in ADR, in a report to the Minister (the Annual Report) (s 16(4)) for tabling in Parliament (s 16(3)). The Annual Report is published in hard copy format as well as on the VSBC website.

A certificate issued by the VSBC may be used as evidence in proceedings before VCAT or a court (s 12(4)).

These measures serve to encourage parties to participate in ADR and attempt to resolve their disputes cooperatively.

When does a party unreasonably refuse to participate in ADR?

Whether or not a party is considered to have unreasonably refused to participate in ADR will be determined by the VSBC on a case by case basis, having regard to the facts and context of the party's behaviour.

What is a 'refusal'?

A failure to respond within a reasonable period of time to a request to participate in ADR will amount to a 'refusal'.

Initial acceptance to participate in mediation followed by a failure to cooperate will also amount to a refusal. For example, a Respondent¹ agrees to mediation but then postpones the mediation date on more than one occasion.

What is an 'unreasonable' refusal?

As a general rule, a party must have good and sufficient reasons for refusing to engage in the process of ADR. Without good and sufficient reasons presented to the VSBC, they will be considered as having refused unreasonably.

The VSBC will look at the conduct of the parties in the context of the dispute, taking into account, where relevant:

- the nature of the dispute and whether it is amenable to ADR;
- whether ADR has a reasonable prospect of success;
- the positions adopted by each party;
- whether the costs of ADR would be unreasonably high in comparison to the amount in dispute;
- background considerations, such as the extent to which other settlement methods have been attempted or whether ADR may cause a delay that is prejudicial to the Respondent;
- other factors the VSBC considers relevant.

Silence constitutes a refusal. The VSBC will, in most cases, regard the failure to respond to a request as itself an *unreasonable* refusal. The refusal would be deemed unreasonable even if the party could, if it

¹ In the vast majority of cases, it is the Respondent party who will be refusing to participate in ADR. These *Guidelines* therefore refer to the Respondent as the refusing party for clarity of reading. However, it can be the Applicant who refuses to participate - for example, after lodging a dispute with VSBC, the Applicant refuses to participate in ADR once the Respondent has agreed to do so. These *Guidelines* apply to the party refusing, not only the Respondent.

chose to, identify good and sufficient reasons for refusal. The rationale is: a request must not be ignored; rather, if the request is considered inappropriate, full and clear reasons must be given.

Examples

Examples of good and sufficient reasons to refuse to participate in ADR may include:

- on an objective view, there is no real prospect of successfully resolving the dispute through ADR. For example, the character and attitude of the Applicant is such that there is no prospect that resolution will be achieved; or the issue in dispute is a matter of legal interpretation which must be resolved by adjudication;
- the Respondent's objections to ADR are bona fide, for example, it is clear that the Applicant is initiating the process for purely 'self-serving' reasons;
- the nature of the dispute is such that it is more appropriately addressed in another forum. For example, there is another statutory process through which the complaint should be resolved;
- the Respondent business or non-profit organisation is insolvent, or ceases to carry on business;
- the conduct of the Applicant is such that it clearly does not have a serious intention to participate in ADR. For example, it is objecting to the appointment of a mediator, the timing of mediation, the terms of the *Mediation Agreement*, or engaging in a pattern of behaviour of making and withdrawing offers;
- the Applicant does not identify the issue/s in dispute, or there is no apparent cause of action triggering a dispute. For example, the claim is too generic for a reasonable person to understand the alleged problem, or the dispute presented suggests that the named Respondent is not the appropriate party to the dispute.

On the other hand, refusal to participate in ADR may be considered unreasonable where:

- refusal is because ADR will involve a payment of money or allocation of time which the party is not willing to contemplate;
- refusal is motivated by completely commercial considerations unrelated to the dispute;
- the dispute is of a kind that lends itself to ADR but the Respondent acts as if their case is so watertight it does not need to engage in ADR, or suggests the dispute is too complex for ADR, or demands the Applicant litigate the matter;
- the Respondent fails to accept the jurisdiction of the VSBC to provide ADR services to try to resolve the dispute;
- the Respondent consistently avoids taking telephone calls, fails to participate in a telephone call, fails to respond to mail or email, is abusive and rude, or unreasonably ends a telephone call.

In all cases, the specific circumstances of the dispute must be taken into account in determining whether refusal is reasonable or unreasonable.

Publication in Annual Report of name of Respondent where unreasonable refusal to participate in ADR has been certified

The general practice of the VSBC is to publish in its Annual Report the details of all certificates that have been issued to a party to a dispute who has unreasonably refused to participate in ADR (s 16(4)). This leads to improved reporting as to the outcome of ADR, and also discourages unreasonable refusal to participate.

The publication of such details is limited to the name of the Respondent business or government or non-profit entity which has unreasonably refused to participate in ADR. As a general rule, the details of the parties will not include the names of the individual or individuals representing that business or other entity.

Generally, the VSBC must not include in the Annual Report any information that would identify any person who is not the subject of any adverse comment or opinion, other than the party identified in a certificate as unreasonably refusing to participate in ADR (s 16(8)).

However, every Respondent in respect of whom a certificate of unreasonable refusal has been issued is given the opportunity to submit to the VSBC reasons why the details of the certificate should not be published in the Annual Report. The VSBC will consider the reasons before making a decision.

VSBC Process – ADR, certificates and Annual Report

The VSBC will contact the Respondent by letter or email in the first instance, bringing the dispute to its attention, informing it of the role of the VSBC in providing ADR services and of the consequences of unreasonable refusal to participate in ADR, referring it to these *Guidelines*, and requiring a response within 10 days.

If no response is received, reasonable efforts will be made to contact the Respondent.

In instances of refusal, the VSBC will form a view as to whether the refusal to participate in ADR is *unreasonable*, based on the response or non-response of the Respondent and the other material available about the circumstances of the case.

Where it is considered that there has been unreasonable refusal, the VSBC will write to the Respondent notifying it that the VSBC intends to issue a certificate certifying that the Respondent has unreasonably refused to participate in ADR, provide information of the consequences of that certification, and provide a further 10 days to participate in ADR.

If the Respondent does not agree to participate in ADR within these 10 days, the VSBC will write to the Respondent informing it of the VSBC decision that there has been unreasonable refusal to participate in ADR, and provide a copy of the certificate. A copy will also be provided to the Applicant. The Respondent will be given a further 21 days to give reasons why the details of the certificate (that is, its name) should not be included in the Annual Report (s 16(5)).

After having considered the response (if any) from the Respondent, the VSBC will write to the Respondent notifying its decision to publish (or not to publish) the details of the certificate in the Annual Report.

For more information contact the VSBC:

vsbc.vic.gov.au

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