

EXECUTIVE OFFICE



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Competition &
Consumer
Commission**

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7 July 2011

Mr Andrew Joyce
General Manager
Small Business and Deregulation Branch
Department of Innovation, Industry, Science and Research
GPO Box 9839
Canberra ACT 2601

Sent electronically: smallbusiness@innovation.gov.au

Dear Mr Joyce

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on the Resolution of Small Disputes Options Paper.

The ACCC broadly supports the proposal by the Australian Government to establish a national small business dispute resolution mechanism. More detailed comments are provided in the attached submission. The views presented in the submission are based on the ACCC's extensive dealings with small businesses in the context of enforcing the *Competition and Consumer Act 2010* (the Act).

Please contact Ms Kim Parker on (03) 9290 1849 if you would like to discuss any of the matters raised in the submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rayne de Gruchy'.

Rayne de Gruchy
A/g Chief Executive Officer

RESOLUTION OF SMALL BUSINESS DISPUTES: OPTIONS PAPER

SUBMISSION BY THE ACCC

Introduction

The Australian Competition and Consumer Commission (ACCC) supports the proposal by the Australian Government to establish a national small business dispute resolution service to complement existing dispute resolution services and the work of the ACCC and other regulators in the small business arena.

The ACCC proposes that the national small business dispute resolution service should take the form of a new office of the National Small Business Commissioner with capacity to deliver a formal mediation function, together with an informal honest-broker dispute resolution function, to allow for the effective and efficient outcomes in the resolution of small business disputes. It is proposed by the ACCC that the functions of this new office will resemble those of the existing Office of Victorian Small Business Commissioner as addressed in more detail below.

The Options Paper

The four options proposed by DIISR in May 2011 range from a fairly minimalist approach to more comprehensive dispute resolution solutions. The options are summarised below:

Option 1 – To establish a **National Information and Referral Service** which would provide a telephone hotline and website to direct small businesses to relevant existing dispute resolution services.

Option 2 – To establish a **National Dispute Resolution Service** which would provide an information and referral service but would also offer a mediation service, using mediators from the standing panel, where no appropriate low cost dispute resolution service exists.

Option 3 – To establish a **National Small Business Tribunal** to specifically resolve small business disputes by investigation, conciliation and review.

Option 4 – To establish a **National Small Business Advocate** to provide independent representation of small business interests and concerns within the Australian Government. An initial referral service would utilise existing low cost state or territory dispute resolution mechanisms and where a gap in existing services is identified, a suitable mediation service would be established, using mediators drawn from a standing panel.

The ACCC's experience in the small business arena

The views presented in this submission are based on the ACCC's extensive dealings in the small business sector across Australia.

An important function of the ACCC is to deal with small businesses in the context of enforcing and promoting compliance with the *Competition and Consumer Act 2010* (the Act) and the mandatory industry codes under the Act. The ACCC's ongoing small business program also focuses on general awareness campaigns directed at small businesses to inform them about their rights and obligations under the Act and various mandatory codes.

The ACCC consults directly with small business through the ACCC's Small Business Consultative Committee which meets twice a year. This Committee comprises key representatives across the small business community including intermediaries such as national or state and territory small business associations.

Small business complaints to the ACCC

The ACCC receives in the vicinity of 9,000 complaints or enquiries per year either from or about small businesses.

Complaints typically fall into the following categories:

- Complaints of conduct which potentially breach the Act;
- Complaints regarding contractual or commercial disputes framed as a complaint of a breach of the Act in an attempt to secure the ACCC's assistance or intervention;
- Complaints regarding contractual or commercial disputes made with the knowledge the dispute may not constitute a breach of the Act but seeking ACCC assistance because of a lack of (affordable) alternatives¹.

Where complaints fall into the first category, ACCC intervention in such matters is strictly guided by the principles espoused in the ACCC's *Compliance and enforcement policy*. Only a small number of complaints received by the ACCC, including those arising from disputes involving small businesses, are suited to investigation and litigation by the ACCC. When matters are formally pursued through a public prosecution, relief is typically awarded in the form of orders to stop the conduct complained of and for penalties.

In theory, private court actions for alleged contraventions of the Act can be taken in the Federal Court but such proceedings are formal and adversarial which mean they can require significant time and cost to secure a resolution. This option is not well suited to resolving commercial disputes between small businesses or between small businesses and larger entities where it is intended that longer term commercial relationships are to be maintained.

¹ Examples of small business contractual disputes relate to:

- the price payable for goods or services
- the quality of goods or services provided
- failure to honour verbal representations made prior to or during the term of the contract
- failure to perform under a contract.

When the complaints relate to contractual or commercial matters, small businesses in dispute are entitled to institute proceedings in the relevant state or territory common law courts, however, many small businesses are reluctant to do so out of fear of potential delays and the uncertainty around the legal fees involved in resolving disputes by this means.

An exception - dispute resolution avenues under mandatory industry codes

Three of the mandatory industry codes under the Act (i.e. the Franchising Code, Horticulture Code and the Oilcode) provide alternative dispute resolution avenues for the parties subject to those codes. These are largely mediation-based dispute resolution mechanisms. In our view, those codes do provide suitable dispute resolution avenues to small business but are limited to only those that fall under these codes.

Present un-met needs in the small business sector

Based on the ACCC's experience and dealings with the small business sector, it considers the greatest area of un-met need at present at a national level, is for a low-cost, quick and accessible dispute resolution and mediation services to be made available to the small business community.

Whilst the ACCC acknowledges that a range of possible dispute resolution services presently exists, generally those avenues are not particularly well suited to the resolution of small business disputes due to the time or cost involved in accessing those services.

The ACCC's proposal to establish an office of the National Small Business Commissioner

The ACCC considers that a National Small Business Commissioner with the capacity to deliver the formal mediation function, together with an informal honest-broker dispute resolution function, is likely to provide effective and efficient outcomes in small business disputes in Australia. This approach is also likely to assist in maintaining the ongoing commercial relationships between the parties than adversarial litigation.

A National Small Business Commissioner might assist with early resolution of that wider set of small business disputes and could usefully complement the ACCC's information, persuasion and enforcement functions under the Act and mandatory codes.

Current examples of the successful use of the informal dispute resolution approach for small businesses exist in the shape of the Office of Victorian Small Business Commissioner (VSBC) as well as a number of State-based retail tenancy registrars. These bodies engage the parties actively and early, taking a hands-on approach to resolving disputes with an eye to the commercial practicality of proposed resolutions.

The VSBC was established by the enactment of the *Small Business Commissioner Act 2003 (Vic)*. It is widely accepted that the establishment of the VSBC has been a success and the establishment of similar new statutory offices in South Australia, New South Wales and Western Australia are presently under consideration by those state governments.

The key roles of the VSBC, relevant to small business dispute resolution, are:

- (a) To investigate complaints by small businesses regarding unfair market practices and to make representations to an appropriate person or body on behalf of a small business that has made a complaint;
- (b) When a dispute cannot be resolved after attempting the above, to attempt mediation between the parties in dispute (The VSBC does not employ mediators but uses a large panel of mediators to undertake the mediations required);
- (c) To promote informed decision-making by small businesses in order to minimise disputes with other businesses.

The VSBC accepts a broad range of small business complaints including those related to retail tenancy disputes and complaints involving owner drivers, forestry contractors, haulage contractors and their hirers.

Functions of a National Small Business Commissioner

The ACCC submits that the functions of a National Small Business Commission should replicate the functions of the VSBC described in paragraphs (a) to (c) above.

In addition, the ACCC considers that a National Small Business Commissioner should have the function to collaborate and link any state and territory small business commissioners and promote a consistent and coordinated approach to resolving small business disputes where practicable. In line with the Australian Consumer Law model, where the particular small business dispute involves a local trader or business it might appropriately fall to the mediation service offered by the state or territory small business commissioner where there is one, and where the dispute is national it might more appropriately be taken up by the mediation service offered by the National Small Business Commissioner. Where there is no state or territory small business commissioner established in the jurisdiction where the dispute arose, the matter would fall to the mediation services offered by the National Small Business Commissioner.

The National Small Business Commissioner would also be well placed to serve as a conduit to other existing dispute resolution avenues and other ombudsman services in particular industry sectors suited to small business matters. The remit of some, but not all, ombudsman schemes presently include small business complaints. Consideration could also be given to the National Small Business Commissioner having a role in endeavouring to ensure that the remit of all existing ombudsman schemes appropriately include coverage of small business complaints.

Relationship between a National Small Business Commissioner and the ACCC

Under the model outlined above, it is anticipated that the majority of small business commercial dispute type complaints would best be considered at first instance by the National Small Business Commissioner who may in turn refer those matters on to its state or territory counterparts (where they exist).

However, those complaints which indicate a serious contravention of a mandatory code or the Act should be referred by the National Small Business Commissioner to the

ACCC or other relevant entities to be considered for intervention and enforcement in accordance with the existing compliance and enforcement policies of those regulators.

The ACCC anticipates that the work of a National Small Business Commissioner would complement and where appropriate, feed into the work undertaken by the ACCC. The responsibilities of the National Small Business Commissioner would be separate from, and not affect, the powers and processes under the Act for which the ACCC has responsibility.

The ACCC anticipates it would develop a close working relationship with the National Small Business Commissioner (as it already has with the VSBC, Telecommunications Industry Ombudsman and Private Health Insurance Ombudsman) to ensure that matters could be referred appropriately and in a timely way between the agencies to provide prompt consideration for small business complaints.

There is presently one Commission member of the ACCC who is responsible for and has a particular focus on small business issues. The focus of this role is to ensure that general consultation takes place between the ACCC and the small business sector about issues concerning the governance of the Competition and Consumer Act in order to enhance our regulatory responses relating to the small business sector. However, the duties of this Commissioner do not extend to offering a dispute resolution service to small businesses across Australia as this would be inconsistent with the independent regulatory role of the Commission.

The VSBC model has, in the ACCC's experience, worked well with the ACCC when investigating and securing court outcomes against parties who have engaged in egregious conduct which required a strong intervention. The most recent example of the effectiveness of this relationship was the ACCC's action against a retail landlord in Melbourne for unconscionable conduct against a number of its small business retail tenants, which was the result of a referral of the matter from the Victorian Small Business Commissioner to the ACCC for investigation.²

National Small Business Commissioner should not form part of the ACCC

The ACCC does not make any proposal with respect to where a National Small Business Commissioner should be located or what existing infrastructure should be used for this office.

The ACCC submits that a National Small Business Commissioner should not be established as part of or within the infrastructure of the ACCC for the following reasons.

The ACCC considers there to be a conflict of interest between the ACCC's investigatory and enforcement roles and the complaint handling functions of a National Small Business Commissioner. The ACCC may ultimately be involved in investigatory or enforcement action taken against a trader or business and this may militate against the full and frank disclosure by the parties to a dispute seeking to use the complaint handling functions of a National Small Business Commissioner if it were to be part of the ACCC.

² *ACCC v Dukemaster Pty Ltd & Anor* VID813/2008. See <http://www.accc.gov.au/content/index.phtml/itemId/878829/fromItemId/855279>.

A further conflict would arise if the parties in dispute attended upon the ACCC for mediation and during the mediation process the ACCC identified that the conduct the subject of the dispute warranted investigation or prosecution by the ACCC under the Act. This is the very reason that the ACCC does not offer a mediation service as part of its responsibilities of regulating the various industry codes under the Act. Under these codes, it is open to the complaint receiver or mediator to refer a potential breach of the Act to the ACCC for potential investigation. The ACCC considers this separation to be important to its ability to carry out its regulatory functions under the Act.

7 July 2011