

General Manager Small business and Deregulation branch  
Department of Innovation, Industry, Science and Research

Dear Sir/Madam,

Please accept the following submission to the initiative related to a low cost, efficient small business dispute resolution mechanism. As an independent contractor (PSB) and small business operator my opinion is that this initiative is long overdue.

It is unfortunate that small business owners are forced to operate in an environment of manifest unfairness. While people of a Darwinian persuasion may advocate that this is simply the reality of life, it is not unreasonable to expect a level playing field in business. I am sure that you will be aware that a strong small business environment is in everyone's interests. Unfortunately the unfairness exists across the board and this criticism can be levied at other small businesses, big business and government agencies.

The fundamental problem facing small business is the inability to contract on reasonable and fair terms. In the main a small business will be forced, out of necessity to accept contracts without negotiation. This readily benefits larger entities that know that unless their conditions are accepted then the small business will simply not survive or will be forced to accept the conditions. This argues for greater reform in the area of fair contracts for small businesses but it is understood that only so much can be done. The dispute resolution mechanism, while admirable, is simply a band aid measure to a more serious issue of exploitation of market strength and unethical conduct. I would strongly recommend that both these areas are researched and that the government, in particular, takes a greater leadership role in addressing this problem.

In relation to the proposed options I have commented on them below. Most of my comments are in relation to Independent Contractors that operate as Personal services Businesses (PSB's). I am sure that you will recognize that the engine room of any economy is driven by entrepreneurs, innovators and people with the fortitude to go into business for themselves. As such, independent contractors are the classic small business.

#### Option 1

This option is aimed at providing information only. It is my experience that the providers of most of these services have little useful knowledge. In relation to independent contractors, for example, it would seem that this hot line and web site will simply refer these people to the Fair Trading Ombudsman. The problem with this is that the Fair Trading Act only deals with a very narrow range of incidents and is largely irrelevant to incorporated independent contractors. The only other option for independent contractors to take in relation to a dispute is to the Independent Contracting Ombudsman. This office is usually only concerned with issues of sham contracts. While the Independent Contractor Act covers aspects of unfairness of contract the ombudsman has little awareness of this and is unable to provide advice or support on specific contractual issues. In general the Independent Contractor Ombudsman will refer any enquirer to a lawyer. This provides little or no assistance. If there is going to be legislation supporting small business then it needs to be spelled out clearly and understood so that any information provision provides examples for both the small business and the organisations that take advantage of small businesses. When the government wants our money (i.e taxes) it goes to great lengths to provide examples and clarification of various scenarios. Yet when it

comes to providing advice there is generally little or no real information to allow a person to be well informed. Most information is high level, vague and glib. For the most part this is to avoid any legal reliance upon it but if it is to be effective then there must be reliance.

### Option 2

A simple and cost effective dispute resolution services is badly needed. In my experience most disputes for independent contractors revolve around termination of contract and payment. For the mediation system to be relevant and effective it would need to be mandatory for both parties to attend. It would also be more effective if the contract remained on foot until the mediation had taken place. This would prevent the unilateral and prejudicial conduct of organisations who feel they can act with impunity towards smaller entities. While this may seem to be a cumbersome imposition on larger organisations it would also serve to force parties to resolve their own disputes as it may be more costly for the large organisations to be bound by the contract (pending mediation) than to come to an acceptable resolution.

One of the biggest problems that face smaller organisations is the unilateral power disadvantage. Most large organisations WANT disputes to go to litigation because they have the resources to be able to crush small business. Mediation basically results in the larger organisation wasting their staffs time whereas engaging a lawyer has negligible effect. In other words it is in big business interest to have the case handled by lawyers as it divests them of the problem. Lawyers will then use every technique to intimidate and discourage the small business. In many cases this will consist of an indemnity costs order which forces a business to pay a large sum into court for the court costs. This amount can have a significant effect on a small business where cash is required to keep going. As such, it is essential that all contracts that are entered into by a small business contain a clause that compels a large entity to submit to the mediation in the first instance.

I would strongly recommend that any costs associated with this option be borne by the party that causes the dispute. There should be a disincentive to big business going to the Tribunal.

### Option 3

It will be crucial to define "small business" (within the ambit of the Tribunals legislation) and which parties come within the jurisdiction of it. Any National Small business Tribunal would also need to cover disputes for independent contractors that are incorporated.

The system must be simple and straightforward. It cannot be a rehash of other Tribunal systems that frown upon incorrectly completed forms and fail to treat the applicant as a business person and not a lawyer. This is one of the key failings of other Tribunals (such as the Fair Work Tribunal). There must also be a presumption that the Applicant has reasonable grounds rather than being treated as if they are simply being vexatious. Small business people face a large risk when making any application to redress an injustice. Most small businesses simply accept that unfairness is the norm and avoid pursuing things because the ramifications are generally not worthwhile. This situation needs to be considered by the Tribunal hearing these matters so that a Small Business is given as much support as possible. Wherever possible, a small business should be able to attend by phone while the offending organisation should be represented in person. Small businesses do not have the resources to conduct these sort of matters as they are generally

engaged in their business affairs. As such it would be appropriate to implement a system that allows the Tribunal to investigate the allegations and stand in the shoes of the small business to determine whether the offending party has a case to answer. If a prima facie case exists then there should be a mechanism whereby the Tribunal can make a preliminary determination so as to minimise the incontinence to the small business. This determination may be less harsh than a full order that might involve a full enquiry and could save all parties (including the Tribunal) the time of protracted hearings and submission of evidence. In other words an offending organisation may be given the option to settle the matter on reasonable terms based upon an initial examination of the dispute given that some matters will be quite obvious - such as an amount owing under invoice or the breach of a condition of contract or the contravention of particular legislation. While this approach may be contrary to the adversarial system adopted by our judicial system it is submitted that an inquisitorial system would be more appropriate so that small businesses are supported rather than burdened when seeking justice.

If a mediation has preceded an application to the Tribunal then the circumstances of the mediation should be considered by the Tribunal so as to avoid duplicating the whole matter. Time is of the essence to small business and if the facts have already been covered then the matter should be dealt with expeditiously. Where possible the Tribunal could (and should) be able to provide other case law to the parties to allow them to resolve the matter before the Tribunal stage.

In relation to costs there should be no costs to a small business for being involved in this mechanism (other than a low application fee). Costs, and or a penalty, should be within the powers of the Tribunal against a larger organisation. There must be a deterrent to large business being involved in any form of dispute with a small business. This is the only way to establish a level playing field so that larger entities realise that they should take all steps to avoid a dispute than simply ride it out and hope to inconvenience the small business into submission. Big business (and Government) must be aware that their involvement in this sort of process could have significant financial implications by way of penalties and costs.

#### Option 4

This option is also desirable but there must be some form of accountability so that small business is aware of the actions of the representative and are kept informed of what initiatives are being proposed.

If you would like further detail in relation to the above please feel free to contact me.

Regards,

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