

# **Options Paper: Resolution of small business (business-to-business) disputes**

## **Option 3 - National Small Business Tribunal**

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### Option 3 - National Small Business Tribunal

The Government's initiative in issuing the options paper, *Resolution of Small Business Disputes*, in May 2011, is commendable. The financial and emotional investment made by many small business operators in their business often represents more than just a means to a livelihood. It can be their future employment and the capital generator for their retirement. Most small businesses work long hours and any serious business-to-business dispute can be time-consuming and a distraction in their working schedule. A prompt, efficient and economic form of dispute resolution is important for small business. Small businesses seldom have the resources to apply to protracted disputes.

2. Understandably, small business will tend look to dispute resolution as a means to obtaining both a recognition and determination of the rights and obligations of the parties. The hope is that an independent umpire will rule expeditiously in favour of one of the parties with the aim of resolving the dispute. However, mediation, for example, does not produce a determination or ruling but it is a useful mechanism to bring the parties together so that they can resolve the issue themselves and re-establish a working relationship. Commercial arbitration is a mutually agreed process where the parties have initially contracted on the basis that a professional arbitrator will examine a dispute and issue a decision that the parties accept. Commercial arbitration can be expensive but it is a long established commercial process and can offer confidentiality as well as an arbitrator who is an expert in complex technical matters that are relevant to a particular dispute. The mechanism of conciliation is set out in the Government's options paper and it identifies a process where the parties are assisted by an independent third party to reach an agreement. The role of the conciliator is not a determinative one. However, if the parties are unable to resolve the dispute themselves they may ask the conciliator to review the dispute and to make a decision for them. As a simplification, these alternative dispute resolution mechanisms have a central approach of getting the parties to talk to each other in a neutral environment to attempt a resolution of their dispute.

3. In many ways, alternative dispute resolution is preferable to initiating legal action which is, by its very nature, adversarial, usually formal and often expensive. The legal process does, however, encourage the use of alternative dispute resolution to avoid, where possible, protracted legal proceedings. In some legal proceedings the court may order alternative dispute resolution as a step in the process.

4. **Tribunals:** There are two broad categories of tribunal in Australia and they are administrative tribunals and civil tribunals. An *administrative* tribunal is usually created under a statute and its role is to review decisions taken by the government in relation to a person affected by the government decision. A *civil* tribunal examines disputes between citizens. Under the federal system in Australia, a civil tribunal created under State law may have a determinative function. There are also private tribunals within industry, the community and sporting associations.

5. Any attempt to create a civil tribunal at the federal level immediately faces restrictive

wording in Chapter 3 of the Australian Constitution. The Australian Constitution stipulates a separation of powers which has the effect of confining the process of determining and enforcing an outcome in civil disputes to a court of law - a judicial function. Consequently, it is, in my opinion, problematical to have a civil disputes tribunal at the Commonwealth level that will satisfy the strict wording of Chapter 3 of the Australian Constitution. This is not a criticism of the Australian Constitution. In my opinion, the wording in the Australian Constitution reveals the intention at the time of federation that the judicial power of the Commonwealth is judicial and that not even for special and convenient purposes should it be an extension of the Executive.

6. In my opinion, it is puzzling, therefore, that the Government's proposal calls the entity to be created a National Small Business Tribunal when its role is to provide a specialised national *conciliation service* confined to small business. The name of the entity should reflect what it is. To call it a tribunal is, I suggest, unhelpful and may blur the distinction between State-based civil tribunals (which may have a determinative function) - and what can be achieved by a tribunal created at the Commonwealth level. The Government's paper cites the example of the Superannuation Complaints Tribunal which involves a useful process, including conciliation, to resolve complaints about superannuation but it must be noted that a disputed decision or enforcement of a determination of that tribunal may still involve the subsequent referral to a court of law.

7. The example of a commercial/retail tenancy dispute is illustrative. It is a relatively common type of dispute for small business. Why would a small business choose to go to a national conciliation service when it can take the matter up locally in a State-based retail tenancy tribunal that can, in all likelihood, provide a binding outcome at an earlier stage than the proposed national conciliation service? It is hard to get past the view that tenancy disputes are probably best dealt with under State-based systems. If this means that the proposed national tribunal will have a more restricted jurisdiction in small business disputes then it is not a "one-stop-shop" for small business.

8. It is only my opinion but the proposal to use the term "tribunal" for this entity appears to me to be misguided and fraught with difficulties. Others may disagree with my view. The main issue for me is that small businesses deserve to be given clarity in what options there are to resolve a dispute. Some businesses may consider that an entity called a tribunal should be a tribunal like the ones they encounter at the State level which usually offer a more determinative process. I doubt that the proposed National Small Business Tribunal will ever fully attain the same effectiveness as a State-based tribunal.