



30 June 2011

The General Manager
Small Business & Deregulation Branch
Department of Innovation, Industry, Science & Research
GPO Box 9839
CANBERRA ACT 2601

Dear General Manager

RESOLUTION OF SMALL BUSINESS DISPUTES – OPTIONS PAPER

I have pleasure in enclosing a submission in response to the Options Paper entitled "*Resolution of Small Business Disputes*".

The submission has been prepared by the SME Business Law Committee of the Business Law Section of the Law Council of Australia.

Thank you for giving us the opportunity to comment.

Yours sincerely

A handwritten signature in black ink, appearing to read "W Grant".

Bill Grant
Secretary-General

Submission on Options Paper concerning Resolution of Small Business Disputes

**Submission by the SME Business Law Committee
of the Business Law Section of the Law Council of
Australia to the Department of Innovation,
Industry, Science and Research**

30 June 2011

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Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The SME Business Law Committee of the Business Law Section of the Law Council of Australia (“the Committee”) makes this submission in response to the Options Paper dated May 2011 released by Senator Nick Sherry, Minister for Small Business and entitled “Resolution of Small Business Disputes” (“the Options Paper”).

The Committee has as its primary focus the consideration of legal issues affecting small and medium enterprises and the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting such businesses.

This submission has been prepared in co-operation with the Business Law Committee of the Law Institute of Victoria and the ADR Committee of the Victorian Bar. The Committee has also sought input from Mark Brennan, the inaugural Victorian Small Business Commissioner and Peter Lisle, the Acting Victorian Small Business Commissioner. The contribution of those bodies and those persons is gratefully acknowledged.

This submission addresses a series of general issues before addressing each of the four options offered for comment.

Executive Summary

The Committee welcomes the Options Paper and congratulates Senator Nick Sherry, the Minister for Small Business, on its development.

For some time the Committee has been advocating small business dispute resolution as an issue warranting consideration by the Federal Government.

The Committee sees no justification for the establishment of a separate, small business specific tribunal with deliberative powers and so it does not support Option 3.

With qualifications, the Committee endorses certain aspects of Options 1, 2 and 4 but on the basis that the States and Territories remain the primary agencies for service delivery.

The Victorian model established under the Small Business Commissioner Act (Vic) is a successful template and its adoption by all States and Territories should be encouraged.

There is a role for the Federal Government to develop a like service for certain small business disputes. The Federal Government should assume primary responsibility for

service delivery where there is no State or Territory service or where there are cross-jurisdictional issues or specific Federal issues.

The establishment by the Federal Government of a telephone and internet based directory of the available small business dispute resolution facilities available throughout the country would be a useful undertaking, but its success will depend upon effective promotion and marketing through a range of channels.

The Committee welcomes the opportunity to consult with the Minister and the Department of Innovation, Industry, Science and Research (“the Department”) on the next steps.

Small Business Disputes

The Options Paper refers to and draws upon research commissioned in 2010 by the Department. The research focuses on disputes between small businesses and other Australian-based businesses. That research, conducted for the Department by Orima Research, was concerned to identify the incidence of small business disputes, as well as identifying any unmet demand.

Small business is a significant contributor to the Australian economy. The Department’s own website notes that:

- small business contributed about 34% of private industry value added in 2008 – 2009;
- small businesses employ around 4.8 million people in 2008 – 2009, representing approximately 48% of private sector employment;
- there are approximately 1.93 million active small businesses in Australia, representing 96% of all businesses.

The Australian economy depends upon the small business sector. It is a significant source of innovation and entrepreneurship and a significant employer. The national interest is served by the barriers to small business establishment being low, the regulatory burden on small businesses being light and the resolution of small business disputes being quick, inexpensive and minimally disruptive.

So it follows that if there is an unacceptable level of small business dispute it is likely to have a significant impact on a significant sector of the Australian economy.

The Orima Research concludes, in part, that slightly fewer than one in five of those Australian small businesses surveyed experienced a disagreement or dispute of some kind over the past five years. The nature of those disputes varied from relatively minor disputes to those serious enough to result in legal action being taken.

It is the experience of legal practitioners working with small businesses that there is a relatively high level of dispute matters which are subject to litigation. The experience of Committee members in day to day legal practice bears out the conclusions of the Orima Research.

The range of issues that arise in small business disputes is wide. The disputes include the following:

1. lease disputes;
2. franchising disputes;
3. supply and distribution arrangement disputes;
4. employment and industrial relations disputes;
5. contractual disputes;
6. debt recovery claims;
7. service disruption disputes;
8. competition related disputes;
9. intellectual property disputes;
10. multi-party supply chain disputes;
11. disputes between small business and large organisations, including government;
12. joint venture disputes;
13. multi-party and multi-issue disputes;
14. internal small business disputes such as partnership disputes and shareholder disputes; and
15. disputes arising from the abuse of market power by larger corporations when dealing with small businesses and the consequential lack of a level playing field in negotiations, pricing, contractual terms and related issues.

It is important to note that many small business disputes do not fit into neat categories, with the consequence that existing sector specific dispute resolution processes are not well suited to the resolution of those multiple issue and multiple party disputes.

Is there a Need not Met by Courts and Tribunals?

When asked to identify barriers to participation in currently available Court and Tribunal based dispute resolution processes members of the Committee identified the following barriers to access:

- language difficulties, which is a significant concern given the influx of migrants and the over-representation of migrants in the establishment of new businesses;
- a previous bad experience in Court based litigation;
- the disruptive effect on the day to day conduct of a business of the proprietor absenting himself or herself from the business to attend Court to engage in protracted dispute resolution;
- the perceived disparity between the cost of Court based dispute resolution when compared with the value of the amount in dispute;
- a power imbalance, as many small business owners feel powerless when confronted with a dispute with a larger business;
- general apprehension about an adversarial process involving unfamiliar procedures, terminology and associated loss of control; and
- cost uncertainty.

Many lawyers dealing with small business clients now routinely advise those clients not to pursue litigation unless the amount of the claim exceeds a threshold. They do so because the cost of Court based dispute resolution is seen to be too high relative to the amount in dispute with smaller claims. The advice is often to either abandon any such claim or to pursue it without legal representation as the cost of representation is disproportionate to the amount involved. That threshold varies; with some firms it is \$10,000 but with mid-tier firms it is as high as \$50,000.00.

If the default setting is that, having regard to the costs of litigation, it is just not practical or economic to pursue through the Courts a claim for less than say \$30,000 then this holds out the potential for systemic abuse and exploitation of small businesses by others in the economy.

There are cultural considerations that also discourage small business owners from pursuing litigation. For a small business proprietor to embark on litigation is a very confronting and daunting proposition. Many such proprietors already feel weighed down by the burden of regulation, the lack of holidays, the constant attention to cash flow and the stress of not having a ready exit from the business. Expenditure on litigation comes directly from the bottom line and affects at a very personal level the financial position of

the business proprietor. That is an entirely different outlook to a larger business adversary who is more likely to be a salaried executive in a larger corporation whose personal income and financial circumstances are not likely to be adversely impacted by the outcome of litigation.

So it is the view of the Committee that Court based dispute resolution processes fail to adequately address the needs of small business and other dispute resolution options should be investigated.

Small Business or SME?

The Australian Bureau of Statistics defines a small business as one that employs less than 20 employees. However there is no consistently applied definition of a small business.

The Privacy Act 1998 (Cth) defines a small business as one with an annual turnover of \$3 million or less.

Section 23 of the Fair Work Act (Cth) defines a small business employer as one that employs fewer than 15 employees at a particular time.

Various State and Territory enactments adopt yet different definitions. Significantly the Small Business Commissioner Act 2003 (Vic), which is referred to in the Options Paper as a useful point of reference, is a minimalist legislative enactment that contains no definition of “small business”. However, the second reading speech for the introduction of the Small Business Commissioner Bill (Vic) indicates that the Victorian legislation intended that the functions and powers of the Commission under that Act should not be confined to small businesses but should extend to small and medium sized enterprises.

In practice, the Office of the Victorian Small Business Commissioner seems to have proceeded on an inclusive basis and treated a small business as being a business other than a large business or a public company.

Given the Committee’s views, as further set out in this submission, there is no useful purpose served by a prescriptive definition of small business. Rather, the better approach is to be inclusive and to treat a small business as a business other than a large business and to leave it to those responsible for the administration of the Federal scheme to exercise some discretion. Indeed, the Committee’s preference is that the term “small or medium enterprise” or “SME” should be adopted in preference to “small business” as it more accurately identifies the relevant sector and is consistent with more contemporary parlance in commerce.

Federal and State Roles

It is the Committee's view that the Victorian model established pursuant to the Small Business Commissioner Act 2003 (Vic) works well; it is in the process of being emulated in other states including South Australia, Western Australia and New South Wales. Working with an annual budget of approximately \$2,500,000, the Victorian Office of the Small Business Commissioner achieves a significant outcome when contrasted with the cost of Court based dispute resolution processes.

It is also the view of the Committee that State and Territory Governments are better equipped at service delivery of various services including the services to support small business. Most such governments already have departments with responsibility to support and promote small business and the expansion of those departments to include a range of small business dispute resolution services would be administratively simple and relatively inexpensive.

Given that view, the Committee's approach is that the role of the Commonwealth Government should be limited to the following:

1. through COAG, to encourage all States and Territories to adopt a similar and consistent model for small business dispute resolution throughout Australia, generally based on the Victorian model;
2. to co-ordinate the States and Territories in the delivery of that business dispute resolution service;
3. to establish an information service and portal, resourced with appropriately qualified personnel, to direct small businesses to the most accessible and available State, Territory or Federal Government service involved in small business dispute resolution;
4. to co-ordinate and consolidate the existing Federal Government dispute resolution services such as those available under the Franchising Code of Conduct and elsewhere;
5. to provide financial support to the States and Territories for the establishment and continuation of the small business dispute resolution processes either established or to be established in each State and Territory;
6. to assume primary responsibility in relation to small business disputes involving Federal Government departments;
7. to assume primary responsibility for the resolution of small business disputes where it is not clear that a State or Territory small business dispute resolution service is available and appropriate;

8. to assume primary responsibility for the resolution of small business disputes involving foreign corporations;
9. working through COAG with the States and Territories to develop industry codes of conduct which encourage participation in small business dispute resolution processes where available;
10. to revise Federal Government tender accreditation processes so as to oblige accredited Federal Government suppliers to participate in small business dispute resolution processes where relevant and available;
11. working through COAG to encourage States and Territories to likewise require that accredited State or Territory Government suppliers participate in small business dispute resolution processes where relevant and available;
12. through COAG to develop with the States and Territories a system whereby participants in accredited small business dispute resolution processes are relieved of the obligation to participate in further mediation in the event that the dispute is not resolved at mediation and proceeds to litigation, thereby ensuring a cost saving and an encouragement to early pre-litigation dispute resolution;
13. through COAG to develop a central and publicly searchable register of businesses and Government bodies and statutory corporations which have refused to participate in small business dispute resolution processes when available and relevant, to supplant the limited sanction of an adverse reference in an annual report to Parliament.

Option One – National Information and Referral Service

“Establish a dedicated national small business referral service that provides information and guidance on dispute resolution”

The Committee endorses this option, but with qualifications.

Already there are numerous websites and services providing information about small business dispute resolution. For time poor proprietors of small businesses the difficulty is to find a central, reliable and complete source of relevant and easily accessible information – a “one stop shop”.

An effective national information and referral service should achieve a number of goals. It should

1. become a single portal by means of which users can identify the broad range of small business dispute resolutions facilities available throughout the country so as to make an informed choice about which might be appropriate;
2. be multi-lingual;
3. provide a series of resources so that small business proprietors have ready access to simple tools to help them prepare for dispute resolution processes;
4. explain the difference between Court based processes and alternative dispute resolution processes;
5. provide links to relevant industry groups and trade associations who might be able to assist in an advocacy role or direct small businesses to those with relevant industry experience, such as lawyers, who are able to do so;
6. it should be a repository of all business related codes of conduct in easily searchable format;
7. incorporate some degree of moderated interactivity so that industry groups and trade associations have the ability to upload relevant information that might supplement the Federal Government offering; and
8. be staffed by appropriately trained personnel with the skills to provide a frontline “triage” service as it often the case that small business proprietors believe they have a dispute when really they just need information about where to go to get further information.

The Committee believes that such a service would be used by small businesses but it would have to be supported by an extensive marketing and promotion campaign directed at a broad range of industry groups and through a wide range of channels.

Option Two – National Dispute Resolution Service

“Establish a national small business dispute resolution referral service that provides information and guidance on dispute resolution. Where there is a service gap for small businesses the Australian government will establish a mediation service.”

With some qualifications the Committee endorses this Option, provided that it is treated as a supplement to and extension of existing small business dispute resolution services otherwise available or to be established throughout the States and Territories.

Drawing upon the experience of highly experienced mediators, practitioners involved in small business dispute resolution, present and past Victorian Small Business Commissioners and their support staff the Committee has identified a number of factors which together combine to produce an effective mediation based dispute resolution process for small business disputes. They include the following:

Early Stage Intervention

Many small business disputes are borne out of ignorance about legal rights and are capable of being resolved by early intervention through an experienced case officer. The Committee advocates and supports the triage system that is used to good effect by the Victorian Small Business Commissioner. It involves staff trained in small business disputes and dispute resolution processes making preliminary enquiries so as to characterise disputes according to their complexity and, where appropriate, acting as honest brokers to facilitate an early resolution. Given the relatively greater expense of scheduling a formal mediation, it makes good economic sense to seek to filter out and deal quickly with those small business disputes that can be quickly resolved so that the available resources can be used to better effect on the more difficult issues.

Availability of an Investigative Power

In the Victorian model the Small Business Commissioner has power to investigate pursuant to Section 6 of the Victorian Small Business Commissioner Act. Whilst there are limited sanctions in the event that there is no cooperation, experience reveals that this power is quite significant as an aid to encourage participation in mediation, particularly if it is applied in a non-threatening manner. Most businesses when confronted with a complaint and an enquiry from a Small Business Commissioner as to whether there might be another side to the story accept the opportunity to state their case and, more often than not, agree to mediate.

Availability of a Representative Power

In Section 5(2)(d) of the Small Business Commissioner Act 2003 (Vic) there is power for the Commissioner to “make representations to an appropriate person or body on behalf of a small business that has made a complaint”. This is an important and useful power that should be available under any standard small business dispute resolution scheme that might be established by the Federal Government. The Committee believes that the role of a Small Business Commissioner carries with it some gravitas and significance and a broadly expressed representational function could work in aid of small business with such bodies as ASIC, the ATO, the ACCC and Government departments if it becomes apparent that there are repeating patterns of dispute in particular areas or government sectors.

Dealing at CEO Level

Whilst the legislation in Victoria is silent on the issue, it is the Committee’s understanding that the Victorian Small Business Commissioner routinely directs more serious enquiries

and correspondence to the CEOs of organisations complained about. Often those CEOs are oblivious to the fact of the dispute and concerned to discover that there is a dispute in the first instance. Enquiries made by an office such as a Small Business Commissioner are attended with respect and don't seem to get caught up in the middle levels of management.

Keeping it Affordable

For a business dispute resolution service to be effective, it must be affordable. The Victorian model is heavily subsidised by the Victorian Government, with the consequence that participants in mediation under the auspices of the Victorian Small Business Commissioner generally only have to pay about \$200.00 for the assistance of a specialist mediator and the provision of a mediation facility.

The relatively low cost of the Victorian model is to be contrasted with the cost of mediation through the Office of the Franchising Mediation Adviser. According to the website of the OFMA, on average mediation costs each party approximately \$1,400. It is for this reason that a significant cohort of franchise related disputants use the Victorian system rather than the OFMA system.

Whilst research may be necessary to demonstrate the cost benefit of a subsidised dispute resolution process, anecdotally it would seem clear that an investment in this process will achieve significant savings compared to the much more labour intensive and expensive Court based system of dispute resolution.

Departmental Responsibility

In Victoria, the Office of the Victorian Small Business Commissioner reports to the Minister for Small Business rather than the Attorney-General. This is important. Any such service should be seen as a support for business rather than an extension of the Court system. Public servants involved in small business support services are generally more alert to the needs of small business proprietors.

Equally, the facilities for small business dispute resolution should be well away from the Courts and be seen to be an entirely different system. It is the Committee's view that it would be undesirable to have any new Federal Government small business dispute resolution process administered by the Attorney-General's Department or in any way conducted through registries of the Federal Courts. The use of Business Enterprise Centres may be appropriate.

Establishing the right culture

As the Options Paper notes, the experience in Victoria has been successful. In large part this seems to have been a function of the quality of the people appointed to fill key positions and the culture that has been established. The Victorian legislation is minimal and extends to just 16 sections, most of them brief. This has been achieved with a budget

of just over two million dollars per annum and resulted in a dispute resolution success rate of well over 80%.

Rural and Regional Disputes

Mediators and legal practitioners involved in small business disputes report that disputes involving small businesses in rural and regional areas are much more difficult to resolve. This seems to be in part because the protagonists in the dispute often have relationships beyond their business dispute. For example, those parties may be connected through sporting groups, church groups and so on which makes the resolution of the dispute much more difficult. Reputation is more important in a smaller community and reputation issues make rural and regional small business dispute resolution more challenging.

Face-to-face Mediation

The Options Paper contemplates the possibility that some dispute resolution might be provided online. The Committee does not believe that online dispute resolution is likely to be as effective as face to face dispute resolution. Mediators and practitioners involved in small business dispute resolution routinely comment on the importance of parties having the opportunity to speak face to face and have the opportunity to seek validation of their upset and their grievance. This just cannot be done over the telephone.

A flexible model should allow for mediators to travel out to the disputants, instead of requiring them to come to a central and city based location. Successful mediations have been held in local Council facilities, at business premises, at facilities provided by local trading associations and so on. A flexible approach is required.

Independent Mediators

The Committee believes that small business dispute resolution through mediation works best when Small Business Commissioners establish arrangements for independent and self employed mediators to be retained on a sessional basis. In Victoria at present, mediators engaged by the Office of the Victorian Small Business Commissioner do so at heavily discounted rates, compared to what they would charge for a private mediation engagement. In part this is a consequence of the aim of some mediators to build up a reputation and to develop experience that will underpin their private practice mediation arrangements. Other mediators see it as an opportunity to develop experience. Similar models exist in other jurisdictions such as the Retail Tenancy Unit and the Fair Trading Dispute Resolution Unit, Department of Finance and Services NSW, which provide useful intake procedures and mediation services.

By having a flexible and large panel of independent mediators the incumbent in a Small Business Commissioner role has much more flexibility in matching mediator with the disputants, instead of being restricted to a smaller number of permanent employees.

Any panel of mediators established under a Federal scheme for small business dispute resolution should require as a condition of entry accreditation to who are nationally accredited and qualified to National Alternative Dispute Resolution Advisory Council standards.

Categorisation of Small Business Disputes

It is the view of the Committee that the proposed small business dispute resolution process should not be limited to complaints by small businesses regarding unfair market practices and should instead extend to:

- complaints by small businesses regarding unfair market practices;
- business disputes involving a small business;
- business disputes between small businesses and other businesses; and
- business disputes between small businesses and government bodies.

Ranking the mediators

Where a panel of mediators is established it is useful for records to be kept as to the effectiveness of panel mediators in achieving successful resolution of small business disputes. The Committee is of the view that a dispute resolution service should not be seen as a 'make work for lawyers scheme' but rather a service for small business proprietors.

Earlier comments in this submission address the first two focus questions.

As the Committee proposes that there be sanctions available to Small Business Commissioners to encourage participation in small business dispute resolution (investigation, representation, annual reporting, accredited Government panel status and dispensation from later mediation if litigation ensues) any Federal Government small business dispute resolution scheme should be established by an Inter Governmental Agreement.

Option Three – National Small Business Tribunal

“Create a National Small Business Tribunal, which will deal exclusively with small business disputes, offering conciliation and reviews of conciliation outcomes. The Tribunal will be backed by Commonwealth legislation.”

The Committee does not support the establishment of a deliberative Tribunal with the capacity to make binding decisions. That is the role of the existing Courts and Tribunals.

A Tribunal with the power to impose decisions inevitable attracts the panoply of judicial consequences. Procedures become more formal, jurisdiction is tightly defined, rules of evidence apply and appeal rights must be established.

Any such venture would attract consideration of the vexed issues of defining small business and a small business dispute. Jurisdictional debate would be certain.

History is replete with examples of Tribunals and Courts which came to life with the aim of avoiding such outcomes and being relatively less formal.

If, despite the Committee's views, the Federal Government is disposed to establish a National Small Business Tribunal with deliberative powers then it should be entirely separate from the other operations and should sit within the departmental responsibility of the Attorney-General's Department.

Option Four – Small Business Advocate

“Establish a Commonwealth Small Business Advocate which incorporates a dispute resolution function for education, early intervention and mediation for small business (business-to-business) disputes.”

The Committee has misgivings about the proposal to establish an independent representation of small business interests. That should be the responsibility of the Minister for Small Business and the various peak bodies throughout the country.

Rather, the Committee supports the adoption of the Victorian model where, under the Victorian legislation, the Small Business Commissioner is a neutral and impartial office with primary responsibilities limited to arranging mediation and investigating small business complaints. It is not an advocacy role but rather an investigatory role, a representational role and an honest broker role. It is precisely because of that independence and neutrality that the Victorian Small Business Commissioner model has been so successful.

The use of the term “advocate” is anathema to the important role of being a neutral honest broker. It should not be used.

Section 5(2) of the Small Business Commissioner Act 2003 (Vic) sets out the functions of the Commissioner and includes the following relevant functions:

- “(c) to receive and investigate complaints by small businesses regarding unfair market practices and mediate between the parties involved in the complaint.”*

There is a broader ancillary power in Section 5(4) which provides that:

“The Commissioner has power to do all things necessary or convenient to be done for or in connection with the performance of his or her function.”

There is a further broad investigative function in Section 6 of the Victorian Act, which reads:

“The Commissioner may investigate any matter relevant to the Commissioner’s functions and powers under this Act.”

Collectively these powers serve in aid of the primary role of assisting small businesses to resolve disputes without the need for litigation or the need for investigation and representation. However, the availability of those additional powers, though used minimally, work to encourage participation in mediation.

Conclusion

The Committee welcomes the opportunity to comment on the Options Paper and looks forward to the opportunity for further consultation. Any questions about this submission should be directed to the Committee Chair Mr Tony Burke on 03 9822 8588 or by email to tony@burkes-law.com.