

Department of Economic Development, Tourism and the Arts

22 Elizabeth Street, Hobart TAS 7000
GPO Box 646 Hobart TAS 7001 Australia
Ph (03) 6233 5888 Fax (03) 6233 5800
Email info@development.tas.gov.au Web www.development.tas.gov.au



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

Dear Mr Joyce

RESOLUTION OF SMALL BUSINESS DISPUTES OPTIONS PAPER

The Tasmanian Department of Economic Development, Tourism and the Arts (department) welcomes the opportunity to make a submission in relation to the Resolution of Small Business Disputes Options Paper released May 2011.

The department leads economic and industry development in the state. Its services include facilitating business growth and investment and creation of a business enabling environment. The department therefore supports non judicial means of settling small business disputes through a single, national scheme.

The department notes the research undertaken by the Department of Innovation, Industry, Science and Research (DIISR) in presenting four mutually exclusive options for small business dispute resolution.

The Tasmanian business dispute resolution legal framework and landscape

At present, Tasmania's regulatory framework for alternative dispute resolution relates to retail tenancies under the Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998. This subordinate legislation remains in force under the current *Australian Consumer Law (Tasmania) Act 2010*. The regulation defines a role for the Office of Consumer Affairs and Fair Trading (CAFT) in attempting to resolve disputes, but without arbitration. CAFT notes that business to business disputes about retail tenancies are not significant in numbers in Tasmania.

The Tasmanian courts, as a separate judicial institution, also administer mediation and conciliation conferences as part of the pre-trial process.

Towards a preferred option: National Small Business Tribunal

Amongst the four options presented, the department gives favour to option three seeing it as the most workable mechanism to achieve the real value of an alternative to litigation. The National Small Business Tribunal (the tribunal) presents a comprehensive and balanced approach encapsulating the elements of non-judicial means of resolving trade disputes. It utilises a comprehensive process involving investigation, conciliation/mediation and adjudication. In developing legislation and other policy framework, mutual interest and good faith in business relationships should be the underlying principles. It is important that the tribunal is easily accessible in terms of location, cost and time for small businesses otherwise the tribunal will not offer a significant alternative to existing court system. As the tribunal will be on a national scale, it is deemed valuable for cross-jurisdiction disputes.

Discussion of focus questions

Eligible definition of "small business"

The Australian Government defines small business in two perspectives: by number of employees, which is based on Australian Bureau of Statistics (ABS) definition, and by annual turnover, which is based on Australian Taxation Office (ATO) premise. ABS defines small business as one that employs less than 20 people, is independently owned and operated, with close control over operations and decisions held by the owners. ATO defines small business as one that has an annual aggregated turnover of less than \$2 million.

For purposes of dispute resolution, the proposed model should consider both definitions. The number of employees and annual turnover are not significant in aiming to amicably settle business disputes. Rather, consideration should be given to the nature of the complaint and the dollar amount involved. It should be noted however, that in making reference to the number of employees in defining small business, some exist as "non-employing" business (specifically those home-based operated and sole trader) and others are employing people on a seasonal basis. The CAFT also noted that some small businesses, particularly those sole/individual traders, are not constituted as companies and therefore the basis for intervention under the Constitution would need to be addressed. As about 39 per cent of small businesses in Tasmania are in exporting industries, the mandate of the tribunal needs to be clear on whether it can handle complaints with/from foreign entities.

There needs to be clarity as to whether the tribunal would be limited to cases involving small business as either of the disputing parties (complainant or respondent). Could it also handle disputes where one party is a medium or large sized company?

The scheme intended for small business as a party may also take into consideration cases involving 'small' claims. The notion of 'small' depends on the parties and their circumstances. For a small trader engaging in large transactions, a small claim may represent a very substantial part of its business. For a large enterprise, the same claim may mean anything under a few hundred thousand dollars. The scheme should support the principle that a small claim is not necessarily an unimportant claim, that is, a dispute over a relatively small monetary amount may have far reaching repercussions, or may in fact be a 'test case' for a number of similar disputes. In some instances, a small claim will be met with a far larger counter claim. It is therefore up to the disputing parties to determine in light of their own situation whether the claim is 'small' and whether to bring the matter to the tribunal.

Best Commonwealth agency placed to establish and administer the tribunal

The department considers that DIISR is the appropriate agency to have administrative supervision over the tribunal with the tribunal remaining an independent quasi-judicial body.

Tribunal as the most cost effective scheme

As indicated in the paper, the cost of the tribunal is unclear at this stage although it is likely the most expensive option. In weighing the costs and benefit of the various options, however, the tribunal appears to be the option that would deliver the most comprehensive dispute resolution service for small businesses, thus the investment of time and resources is envisaged to be worthwhile. The Tasmanian Government is keen to be involved in further discussion on how costs would be allocated across states/territories and the Commonwealth.

Recruitment of tribunal members

The tribunal should be predicated on the following core values: equality, fairness, impartiality, independence, and respect for the law, accessibility, competence, integrity, accountability and efficiency. Members should be recruited and appointed based on knowledge and skills, behaviours and attitudes. The tribunal will be ideal to have a combination of members with background on small business administration and commercial law who will be assume the role through an appointing authority, e.g. Governor-General or minister. Ad-hoc members such as IP experts, industry standard specialists, and financial consultants and bankers may also be invited to sit in the tribunal as resource person on a case by case basis.

Duplication of existing services

The department considers that the scope and jurisdiction of the tribunal should be explicitly expressed to avoid duplication with state and territory governments, 'forum shopping' by complainants and confusion among stakeholders. Provisions from jurisdictional legislations on alternative dispute resolution schemes must be built into the legislation creating the tribunal. Boundaries should also be defined in relation to those sectors and industries with mandatory industry codes of practice such as franchising code and horticulture code; and those covered by business activity-specific legislation such as retail tenancy.

The department welcomes further opportunity to discuss the details of the options with DIISR following its consideration of the initial feedback. Should you have any queries in relation to the above, please contact Primo Bernardo, Program Officer in the department's Export and Enterprise unit, either by email at Primo.Bernardo@development.tas.gov.au or telephone on (03) 6233 5537.

Yours sincerely



Mark Kelleher
Secretary

29 June 2011