

Victorian Government submission to the Commonwealth Government's *Resolution of Small Business Disputes – Options Paper*

Overview

The Victorian Government is in a unique position to provide informed feedback on the Commonwealth Government's *Resolution of Small Business Disputes – Options Paper*. Through the Office of the Victorian Small Business Commissioner (VSBC), Victoria has been the first Australian jurisdiction to deliver government-provided dispute resolution for small businesses. Moreover, the VSBC has been the only specialist provider of assisted dispute resolution specifically for small businesses, to resolve business-to-business and business-to-Victorian Government disputes. In particular, it is significant that the VSBC has the power to mediate most types of business-to-business disputes. This contrasts with government-provided dispute resolution services in other jurisdictions which are generally restricted to retail lease disputes.

New South Wales, South Australia and Western Australia are presently each seeking to establish their own Small Business Commissioner (SBC) based on the Victorian model. These jurisdictions, as well as the Small Business Ministerial Council (SBMC) and the Options Paper itself, recognise the VSBC as a best practice model for small business dispute resolution. It is this experience as a leader in the field upon which Victoria has drawn in preparing its submission.

The Options Paper aims to ensure each option 'does not duplicate or overlap existing mechanisms'. However, it is the view of the Victorian Government that the four options proposed will provide limited, if any, benefit to Victorian small businesses as the proposals do indeed duplicate, overlap and, in some instances, replace existing State services. Accordingly, the Victorian Government proposes an alternative option for consideration by the Commonwealth Government that seeks to address identified gaps in the current system without duplicating, overlapping or replacing existing mechanisms.

The Victorian Government's response to the Options Paper is structured under the following three sections:

1. ***Experience of the VSBC***: This section covers the role and functions of the VSBC, its success in providing dispute resolution, the role of government-provided alternative dispute resolution (ADR) and demand from small businesses for dispute resolution services.
2. ***Proposed Commonwealth Options and the Victorian Government's perspectives***: This section provides an overview of the advantages and disadvantages of each Commonwealth option from Victoria's perspective.
3. ***Victorian Government's alternative proposal***: The final section proposes an alternative option that identifies three key areas that the Commonwealth Government could most appropriately address in bringing about a national dispute resolution service.

1. Experience of the VSBC

In 2010, KPMG was commissioned to undertake an independent, evidence-based evaluation of the VSBC. The VSBC also undertakes ongoing data collection which is reported each year in its Annual Report. Both sources are used in this section to support Victoria's submission.

1.1 Role and functions

The VSBC was established in 2003 under the *Small Business Commissioner Act 2003* to provide Victorian small businesses with practical support and access to a low-cost means of quickly resolving disputes, to reduce the cost of doing business.

The overall aim of the VSBC is to assist small businesses when they are faced with unfair market conduct by other businesses. The VSBC's vision is:

- a business environment that promotes competitiveness and fairness for Victorian small businesses;
- a business and regulatory environment that supports informed decision-making by small businesses;
- a retail tenancies regulatory framework that promotes greater certainty, fairness and clarity in the commercial relationship between landlords and tenants, and provides an appropriate mechanism for the prevention or early resolution of disputes; and
- a dispute resolution mechanism that assists parties to retail lease, contractor and hirer, or commercial disputes referred to the Office to settle such disputes in a low-cost, non-adversarial environment.

The VSBC's powers and functions arise from provisions in a number of Acts, namely, the *Small Business Commissioner Act 2003*, *Retail Leases Act 2003* and *Owner Drivers and Forestry Contractors Act 2005*. The VSBC's core services are:

- **information and education** to promote informed decision-making by small businesses and help minimise disputes with other businesses;
- **preliminary assistance** by VSBC staff to help resolve disputes without the need for formal mediation;
- **mediation and ADR** to provide efficient, low-cost resolution of disputes through facilitated agreement between the parties, promote the maintenance of existing business relationships, and ensure clarity, fairness and certainty in the interactions between businesses;
- **business conduct reviews** to address industry-wide issues, with a view to developing education, information and support to minimise and successfully manage disputes; and
- ongoing review of **Government practices** to facilitate more effective relationships between Government agencies and their small business clients and customers.

1.2 Success of the VSBC

The KPMG evaluation found the Office to be: operating more efficiently each year of operation; effective in delivering against its objectives; and delivering cost and time savings to participant businesses.

Efficiency

Expenditure at the VSBC has remained relatively constant since its establishment but the number of applications has increased significantly. The number of applications per \$1 million in expenditure has increased by 159 per cent since 2003-04, demonstrating an ongoing efficiency improvement of around 20 per cent annually.

Effectiveness

The VSBC's mediation success rate over the past four years is around 80 per cent, and was 77.4 per cent in 2009-10. The VSBC's success rate is significantly higher than that of the Victorian Civil and Administrative Tribunal (VCAT), which was 57 per cent in 2009-10.

Further, the KPMG evaluation states that client satisfaction with the mediation service appears to be extremely positive, indicating the service is very effective in addressing the needs of small businesses. The 2009-10 Annual Report states a client satisfaction rating of 94 per cent.

Delivering cost and time savings to participant businesses

The VSBC has improved the timeliness of processing a dispute from application to finalisation, from 10 weeks in 2006-07 to eight weeks in 2009-10. The Office is, on average, six weeks faster than VCAT at resolving a dispute, which represents a significant saving for small businesses and a faster return to 'business as usual'.

The KPMG evaluation states the VSBC saves Victorian businesses a minimum of \$112 in application fees. In addition, costs related to legal representation and productivity losses through absence from the business, which could be substantial, are avoided. The majority of mediation clients reported that participating in the VSBC mediation process saved them both time and money.

1.3 General benefits of ADR in business-to-business disputes

The general literature and research on dispute resolution attributes numerous benefits to the use of ADR compared to court-based dispute resolution. Through its preliminary assistance and mediation services, the VSBC provides tangible and intangible benefits for business, government and the economy which are highlighted below.

- ***Reduces the incidence of business disputes:*** the VSBC actively informs the business community on ways to improve business conduct and reduce the incidence of unfair practices. For example, the VSBC has run successful education campaigns including 'Forming and Maintaining Winning Business Relationships' and 'Read, Research, Review (Should You Sign It?)'. Improved business conduct results in fewer disputes and disruption, more effective dispute resolution when disputes occur, and the maintenance of commercial relationships.
- ***Reduces the cost of business disputes:*** the VSBC provides a timely, low-cost service which reduces both the legal costs incurred by participating small and large businesses in dealing with disputes and the time lost to business in dispute resolution.

- ***Reduces the personal and social costs associated with the dispute process:*** through its efficient and effective service the VSBC contributes to reducing the emotional stress on business operators and their families that can accompany protracted litigation.
- ***Improves business performance:*** which results from more informed decision-making and less time spent away from the business.
- ***Provides more equitable outcomes:*** a significant effect of providing an alternative dispute resolution process is to help to redress imbalances in the parties' bargaining power.

Importantly, the use of ADR may contribute to better future relations between the parties than would be the case following court-based dispute resolution. The likelihood of further disputes arising between the parties is thereby reduced and this in turn, yields an additional source of potentially significant cost savings for business, government and the economy.

1.4 Demand for government-provided dispute resolution

In all of the VSBC's jurisdictions, the number of matters referred to the Office has been steadily increasing. The VSBC received 543 formal referrals in its first full year of operation in 2003-04, which has increased to 1,380 referrals in 2009-10. This is equivalent to an average increase of about 17 per cent annually. The data available shows a trend towards demand increasing in future years, with no indication that demand is levelling off in the foreseeable future.

Further, the KPMG evaluation reports that stakeholders indicated a clear demand for the VSBC's services, in particular dispute resolution which provided benefits over other time-consuming and costly court activities. The vast majority of stakeholders saw a need for government to provide these services, as an independent and impartial party is required to mediate such matters.

2. Proposed Commonwealth options and Victorian Government's perspectives

The Victorian Government does not support any of the Commonwealth's proposed options as they are presented and all would clearly require further development, as acknowledged in the Options Paper itself. Each option provides limited if any benefit to Victorian small businesses, as outlined below.

2.1 Option 1 – National information and referral service

The VSBC, Business Victoria website, and the Victorian Business (telephone) Line already adequately and comprehensively provide the relevant information and referral services. Therefore, this option will duplicate existing State service delivery and may create unnecessary confusion for Victorian small businesses. Such duplication and confusion may also occur to some degree in other jurisdictions.

Further, while Option 1 is the cheapest and quickest option to implement, it does little to achieve the goals set out in the Options Paper. Option 1 does not of itself help

ensure small businesses across Australia have access to a prompt, low-cost dispute resolution service and, therefore, provides limited value to Australian small businesses regardless of which jurisdiction they operate in.

2.2 Option 2 – National dispute resolution service

As in Option 1, the dedicated website and phone line, information and guidance service and referral service proposed as part of Option 2 offer limited benefit to Australian small businesses, particularly Victorian small businesses.

However, Option 2 is preferable to Option 1 because it also proposes a mediation service that would potentially be able to handle cross-jurisdictional disputes (e.g. between a Victorian business and an interstate business). The VSBC does not presently have clear powers to mediate such disputes, so an important gap in the current system would be addressed.

Notably, Option 2 does not actually propose any legislation that would give the mediation service clearly mandated roles and functions. This is in contrast to the *Small Business Commissioner Act 2003* which determines the role and functions of the VSBC in undertaking dispute resolution for small businesses, as outlined in section 1.1 above. Therefore it seems the proposed mediation service could only operate similarly to Victoria's 'Find an Advisor' scheme or the Commonwealth Government's 'Advisor Finder' service, whereby a small business is simply referred to a private mediator (selected from a panel of mediators).

A mediation service operated in this way might provide some limited benefit for small businesses in jurisdictions presently without government-provided ADR, given that a Commonwealth subsidy would apply to mediation costs. However, the subsidy would need to be substantial if small businesses were to pay a mediation fee comparable to fees charged by the VSBC, where each party pays \$195 and the Victorian Government provides a subsidy of \$510 to meet the \$900 paid per mediation session. The Options Paper suggests a private mediator can charge daily fees starting from \$2,000. Therefore, unless the standing panel agrees to provide mediation at lower fixed fees, the cost effectiveness of this option is questionable.

Further, only some jurisdictions will in effect receive ADR funding under Option 2, as small businesses will only be able to access the mediation service if a government-provided ADR service does not exist in their jurisdiction. This in turn raises equity issues in relation to Commonwealth-State funding arrangements.

The awareness campaign proposed as the fifth element of Option 2 may duplicate existing State based information and education campaigns. The Victorian Government would therefore support such campaigns on the condition that they proceeded in partnership with the States and Territories so as to complement, rather than duplicate, existing campaigns.

2.3 Option 3 – National Small Business Tribunal

Option 3 is considered to represent the lowest value for money of the proposed options, given it would appear to be the most expensive and the most difficult to

implement. Importantly, this option does not fulfil the aims set out in the Options Paper, namely to develop a national dispute resolution service that is accessible, prompt and as low-cost as possible for small businesses but that does not overlap or duplicate existing mechanisms. Essentially, this option would mean the VSBC's jurisdiction is reduced to retail tenancy and franchising disputes.

Overall, Option 3 seeks to replace, and potentially duplicate, existing State based service delivery. This option is not fully articulated and could conceivably involve a referral of powers to the Commonwealth so that it has the jurisdiction to deliver services that Victoria currently delivers. Through the VSBC and VCAT, a Victorian small business already has adequate means through which it can seek to resolve a business dispute and the Victorian Government does not support the replacement of any part of this system.

This option is likely to have a negative impact on Victorian small businesses because it would add confusion and administrative burden by requiring small businesses to deal with more than one dispute resolution body, depending on the type of dispute. This is at odds with both the Victorian Government and Commonwealth Government's commitment to reduce red tape for small businesses.

Further, most jurisdictions offer some form of government-provided dispute resolution for retail lease disputes, given that retail lease legislation is State based. Evidence from the VSBC experience and elsewhere suggests that retail lease disputes are one of the major and most frequent types of disputes, therefore the majority of small business dispute resolution would in any event continue to be undertaken by the States.

Under this option, a Victorian small business would have to seek dispute resolution for other types of disputes through the National Small Business Tribunal (NSBT). The proposed NSBT intends to resolve disputes primarily through telephone and potentially online mediation which, in most cases, represents an inferior service to the face-to-face dispute resolution currently provided by the VSBC and VCAT.

In addition, this option proposes specifying eligibility criteria to determine who can use the NSBT and the financial threshold of matters to be dealt with. This approach may inadvertently exclude legitimate disputes and leave small businesses without appropriate access to low-cost, timely dispute resolution.

While the Victorian Government does not support Option 3, it is acknowledged that there are elements of this proposal that would benefit small businesses. The proposed NSBT would be able to handle cross-jurisdictional disputes, for example, between a Victorian business and an interstate business. The VSBC does not presently have clear powers to mediate such disputes, therefore a gap in the current system would be addressed. Unlike the mediation service proposed in Option 2, the NSBT would be backed by legislation that would give the NSBT a clear mandated role and functions.

The NSBT would also benefit small businesses in jurisdictions without government-provided ADR, given that a Commonwealth subsidy would apply to mediation costs. However, the same concerns raised under Option 2 regarding the subsidy level and equity issues in Commonwealth-State ADR funding also apply to Option 3.

Finally, while the proposed telephone/online dispute resolution service is not supported as a primary means of dispute resolution, it is acknowledged that such a service offered as a supplementary option may be of benefit to small businesses involved in cross-jurisdictional disputes or located in regional areas.

2.4 Option 4 – Small Business Advocate

Option 4 combines, and potentially confuses, the roles of a Small Business Advocate with a Small Business Commissioner. The Victorian Government believes that while a Small Business Commissioner appropriately plays an advocacy role, as evidenced by the inclusion of such in the functions prescribed by the *Small Business Commissioner Act 2003*, this role is focussed on dispute resolution and related issues. However, the advocacy role of a Small Business Advocate would be much broader, pointing to a greatly different role to that of a Small Business Commissioner.

Further, a Small Business Advocate could duplicate existing advocacy functions in each jurisdiction. Ministers for Small Business across the various jurisdictions already advocate on behalf of small business and the added value of a national Small Business Advocate appears limited.

The mediation service proposed in Option 4, like Option 2, could offer some benefit to Victorian small businesses. This is because the mediation service proposed may be able to handle cross-jurisdictional disputes, which the VSBC does not have clear powers to mediate. However, Option 4 raises the same concerns as Option 2 in regard to the implementation of the mediation service, including the subsidy level and Commonwealth-State ADR funding issues.

3. Victorian Government's alternative proposal

The Victorian Government supports the implementation of a national dispute resolution service that addresses gaps in the current framework and does not duplicate or overlap existing mechanisms. To this end, the Victorian Government outlines below an alternative option, for consideration by the Commonwealth Government, involving three specific actions.

3.1 Establish a mediation service specifically for cross-jurisdiction disputes

The VSBC will attempt to mediate a dispute if it involves a Victorian business and a business from another State/Territory. However, the VSBC does not have clear powers to mediate such disputes. The Commonwealth Government could fill a gap in the existing dispute resolution framework by providing a mediation service specifically for cross-border disputes. Such a gap is also expected to exist for other jurisdictions.

Accordingly, the Victorian Government recommends the Commonwealth Government establish a mediation service based on the Victorian model, specifically for cross-jurisdictional disputes. Basing a cross-jurisdictional dispute resolution service on the Victorian model would also help create consistency nationally, as four States would then have a similar dispute resolution service in place

(once New South Wales, South Australia and Western Australia have all implemented their own SBCs).

3.2 Establish a mediation service for small business-to-Commonwealth Government disputes

The Victorian Government recommends that the Commonwealth Government undertake an education and awareness campaign specifically to inform small businesses (and not just the general public) of existing services offered by the Commonwealth Ombudsman. The Victorian Government also suggests the Commonwealth Government could review the Commonwealth Ombudsman's existing services and consider how it could implement a mediation service for disputes specifically involving a small business and the Commonwealth Government.

None of the Commonwealth's proposed options provide for this important function, which is offered at a State level by the VSBC, as an avenue to address small business-to-government disputes. Governments of all levels should lead by example when dealing with small businesses and help minimise the real or perceived imbalances of power in the business relationship. The establishment of an independent, impartial and transparent dispute resolution service for disputes between small businesses and the Commonwealth Government is one way in which this can be achieved.

3.3 Encourage the adoption of the SBC model by all jurisdictions

The VSBC has proven to be an effective model of dispute resolution for small business. Three States have already indicated their intention to implement their own SBC based on the Victorian model. **The Victorian Government recommends that the Commonwealth Government encourage, and assist where necessary, remaining States/Territories to adopt a SBC in their own jurisdiction.**

This approach will achieve the goals of the Options Paper by creating a national system of dispute resolution and provide small businesses across Australia with access to low-cost, efficient dispute resolution without overlapping, duplicating or replacing existing mechanisms. This approach maintains State based service delivery, which can be more easily tailored to the needs of small businesses within each jurisdiction and deliver greater value to small businesses.

3.4 Conclusion

The Options Paper seeks stakeholder views on ways to assist small businesses to resolve their disputes with other businesses. The Victorian Government has identified three key gaps in the current framework and seeks to address these gaps by recommending to the Commonwealth an alternative proposal, based on a proven model of small business dispute resolution. Such an approach avoids overlapping, duplicating or replacing existing mechanisms, which is apparent to some degree in each of the Commonwealth Government's four proposed options. Further, the Victorian Government alternative proposal fulfils a key aim of the Options Paper as implementation of the proposed actions will assist in bringing about a national dispute resolution service that is accessible, efficient and low-cost for small businesses across Australia.

