

Our Ref: D11/2279

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SUBMISSION TO OPTIONS PAPER *RESOLUTION OF SMALL BUSINESS DISPUTES*

Thank you for providing the Small Business Development Corporation (SBDC) with the opportunity to provide feedback from a small business perspective on the Department of Innovation, Industry, Science and Research's (DIISR) Options Paper *Resolution of Small Business Disputes*.

The SBDC is a Western Australian State Government statutory authority established to facilitate the development and growth of small businesses in Western Australia. One of the agency's key strategic goals is to improve business skills and knowledge in the small business sector by providing accurate business advice on a range of topics in an efficient and timely manner. Currently the SBDC provides advice on matters pertaining to retail tenancy, franchising and business to business disputes amongst others, and also provides an advocacy service for small businesses in dispute with government agencies.

During 2009/10, the SBDC Small Business Advisory team handled a total of 49,162 telephone, email and face-to-face enquiries from prospective and existing small business operators. This included providing information and guidance to over 2,300 small business clients on issues involving commercial tenancies, as well as assisting 121 clients in making applications to the State Administrative Tribunal (SAT) regarding their commercial tenancy dispute.

INTRODUCTION

The SBDC welcomes efforts to increase alternative dispute resolution (ADR) options for small business in Australia, and supports the Commonwealth Government's aim of identifying and addressing gaps in the provision of ADR services. However, it is imperative that duplication of existing State-based services is avoided, especially as initiatives in this respect have already been introduced, or are now well advanced, in New South Wales, South Australia, Victoria and Western Australia.

As you may be aware, legislation to establish a Small Business Commissioner in Western Australia has recently passed through State Parliament and is awaiting assent. The Small Business Commissioner will provide a subsidised ADR service (through mediation) offering hands on, timely assistance and advice to small businesses in relation to business-to-business and business-to-government disputes. The Small Business Commissioner will also have a mandated role in relation to retail tenancy disputes.

The Small Business Commissioner will receive complaints from small business operators in Western Australia about the unfair market practices of other businesses as well as the commercial activities of government agencies. The immediate focus of the Commissioner will be to resolve disputes between landlords and tenants as a result of extended retail trading hours. Complaints will be investigated by the Commissioner and preliminary assistance provided to both parties to attempt to find an equitable solution to the dispute. If necessary, a professional mediator will then be appointed to attempt to mediate a resolution to the dispute. If this proves unsuccessful, remedy would need to be pursued through the tribunal or court system.

In the case of retail tenancy disputes specifically, a party will not be able to take a matter forward to the SAT for a determination without first receiving a certificate from the Small Business Commissioner stating that dispute resolution has not succeeded, is unlikely to succeed, or is not a reasonable way forward under the circumstances. The Commissioner would be able to include on this certificate details about the conduct of parties during the ADR process. The SAT then has the ability to take conduct into consideration and award costs against a party who has not cooperated at mediation. As a result, it is anticipated that most parties to a retail tenancy dispute will be persuaded to participate in the Commissioner's dispute resolution processes.

COMMENTS ON THE OPTIONS PAPER

The SBDC has considered the four Commonwealth-initiated ADR alternatives outlined in the Options Paper and has some reservations about the potential impact and unintended consequences of their introduction on the existing and soon-to-be-established small business dispute resolution mechanisms in Western Australia. Specifically, the SBDC is concerned about the following:

- *Duplication of services* – there is a strong likelihood that State-based ADR systems and resources would be unnecessarily duplicated by the implementation of a national small business dispute resolution service;
- *Jurisdictional issues* – there are likely to be a number of jurisdictional issues involved in introducing a national service that cuts across areas of State responsibility, including significant legal and political challenges;
- *Accessibility of services* – there is the potential that small business operators in Western Australia would have difficulties accessing a centralised, eastern-states based dispute resolution service if the National Small Business Tribunal option was pursued; and
- *Definitional issues* – there remains ongoing issues in relation to the various definitions of small business employed by Commonwealth agencies and in ensuring equitable access for businesses involved in the sector.

A more detailed discussion on each of these areas of concern follows.

Duplication of Services

The SBDC believes that a number of the ADR services proposed in the Options Paper have the potential to duplicate the existing services and work already underway by other jurisdictions. The duplication of services:

- is likely to cause confusion for small businesses about where and how to seek advice and support;
- will be costly and could possibly take a long time to implement; and
- could potentially lead to jurisdiction shopping.

An example of the potential duplication of current services is the national telephone and online advice service as proposed in options one and two, building on the Commonwealth Government's existing Small Business Support Line and Advisor Finder.

In July 2010, the SBDC provided comment on the Small Business Support Line as part of a DIISR review. In our feedback, the SBDC noted our concerns about the quality, consistency and reliability of advice provided to small business clients, and it was our view that significant improvements to the Small Business Support Line were needed. Of particular concern was the lack of local knowledge by Small Business Support Line advisors in relation to applicable State laws and commercial tenancy arrangements.

It is important that support line operators providing advice to small businesses are able to offer accurate and timely information relevant to the specific business's circumstances, and are aware of the full range of both Federal and State-based services and legislative requirements. This is even more paramount if these advisors will be providing 'quasi' legal advice in relation to matters involving commercial disputes.

The Options Paper proposes that a National Information and Referral Service would direct clients to dispute resolution services in their relevant jurisdiction. Given that a number of States and Territories are currently working towards the establishment of ADR services for small businesses, the National Information and Referral Service risks adding an additional step for small businesses to take when seeking advice and support in relation to their dispute. In Western Australia, this has the potential to jeopardise the marketing programs and branded messages in place for State-based ADR services.

A National Information and Referral Service as proposed in option one would dramatically dilute the SBDC's brand recognition as the 'one-stop shop' for small business advice and assistance in Western Australia. This has the potential to confuse small business operators here and create uncertainties about what the best course of action should be when a small business finds itself in dispute with another business. As such, any national referral service would need to be fully integrated with existing State-based services to provide a single pathway for dispute resolution.

Jurisdictional Issues

The potential for duplication of services, in turn, poses questions relating to the jurisdiction of any federal ADR scheme vis-à-vis areas of state regulatory oversight, such as retail tenancies. The creation of a National Small Business Tribunal, as proposed under option three, would require extensive legislative consideration and political consultation to define the Tribunal's role and jurisdiction. The resolution of legal and constitutional issues would be required which is recognised in the Options Paper as challenging, and is likely to be a long-term and costly option to implement.

The SBDC does not support the establishment of a mediation or conciliation service in duplication of the ADR services to be provided by the Small Business Commissioner in Western Australia, as proposed in options two, three and four, and is generally not supportive of Commonwealth activities in areas of State responsibility.

The SBDC believes that small businesses are already confused over duplicative and/or competing services provided by both the State and the Federal Governments. For example, the Commonwealth-funded Business Enterprise Centre (BEC) network, which aims to position itself as the "Principal support for small and micro business in Australia" (BEC Australia Strategic Plan 2011-13), is often in direct overlap with the services provided by the SBDC supported Small Business Centre network in Western Australia.

The Constitutional issues discussed in options three and four (a National Small Business Tribunal and a Small Business Advocate respectively) highlight the uniqueness of each jurisdiction's legal, business and geographical environment and the significant challenges involved in implementing such options. For instance, the creation of a Small Business Advocate as proposed in option four would potentially create confusion in the small business sector as to the respective roles and responsibilities of the national Advocate and that of the Western Australian Small Business Commissioner.

In addition to this confusion and uncertainty, the creation of a Small Business Advocate or a National Small Business Tribunal could raise significant questions in terms of the jurisdiction of each entity, including issues around double jeopardy and natural justice for disputing parties.

For example, if a dispute was dealt with by the Small Business Commissioner in Western Australia, would an affected party be permitted to then seek further assistance from the Commonwealth Small Business Advocate or apply for a decision from the National Small Business Tribunal if it believed a more favourable outcome could be achieved? The SBDC would also be greatly concerned if the Commonwealth Small Business Advocate or National Small Business Tribunal were empowered to interfere in the established processes and decision-making capacity of the SAT or the court system in Western Australia.

Furthermore, it is unclear how Small Business Advocate or National Small Business Tribunal decisions would be enforced in Western Australia and which Government agency or jurisdiction would enforce them. This could potentially lead to a significant cost impact on the State.

If the decisions of the Tribunal are challenged, there will need to be mechanisms to refer the matter to the Australian Competition and Consumer Commission (ACCC). However, the SBDC has concerns about the existing level of resourcing and service delivery by the ACCC and believes that many small business disputes fail to get adequate recourse through this channel.

The omission of retail tenancy and franchising disputes from the National Small Business Tribunal model could also cause frustration for small business operators involved in franchising, who will be unable to access this option. Anecdotally, the SBDC is aware that access to affordable and reliable justice for franchise parties in dispute is one of the biggest shortfalls of the current franchising regulatory framework, and will be one of the key foci of the Small Business Commissioner in Western Australia.

With these factors in mind, the SBDC does not support the establishment of a National Small Business Tribunal as a first point of contact for small business dispute resolution in Western Australia. This is a role for the Western Australian Small Business Commissioner, whose principal aim will be to minimise the number of small business disputes escalating to tribunal or court action through the provision of low-cost ADR services.

Accessibility of Services

Accessibility is a key consideration for any small business dispute resolution service and the SBDC has a number of concerns regarding the geographic location of ADR services, especially that proposed by a National Small Business Tribunal. The establishment of the Tribunal in a capital city, most likely in Canberra or Sydney, would pose considerable logistical and cost issues for small businesses located in other States or Territories, particularly those in Western Australia.

In addition to the physical location of the Tribunal, the proposal that applications be lodged online discriminates against those businesses, especially in regional and remote areas, which do not have easy access to information technology services.

The SBDC believes that any funding which may be allocated to implement and promote ADR services in those States and Territories where gaps exist should be matched with contributions to those jurisdictions that already have established more comprehensive dispute resolution services to small businesses. Jurisdictions that already provide these services should not be penalised by being excluded from Commonwealth support for ADR. Indeed, the SBDC is of the view that the Commonwealth Government should seek to add additional value to the existing small business ADR frameworks.

Definitional Issues

The *Small Business Development Corporation Act 1983* (WA) intentionally does not define what a small business is, allowing flexibility in the SBDC's operations in terms of who support can be extended to. The SBDC notes that at the federal level, there are varying definitions of a 'small business', including between agencies such as the Australian Taxation Office, the Australian Bureau of Statistics and the Fair Work Ombudsman.

The inconsistent treatment of small businesses, based on the diverging definitions used by the various regulatory and reporting authorities, has been a longstanding concern of the small business sector in Western Australia that has been repeatedly raised with the SBDC. Given this, it is imperative that any potential Commonwealth small business ADR service addressed this issue to ensure that small businesses throughout the country have equitable access to justice.

CONCLUSION


The SBDC is generally supportive of the Commonwealth's overall intent to explore gaps in affordable and accessible ADR options for small business in Australia. While the SBDC agrees that Commonwealth action should be to assist, enhance and supplement where necessary, from our experience the SBDC has concerns that this doesn't always occur effectively and has in the past led to unnecessary duplication of costs and resources, to the detriment of the small business sector.

In relation to options one and two, the SBDC is primarily concerned about the potential for duplication and small business confusion associated with introducing mechanisms that are effectively already in place in Western Australia, along with a number of other jurisdictions. The SBDC is also concerned about the substantial jurisdictional, legal and cost issues associated with option three, as well as the potential confusion and overlap in the roles and responsibilities of option four and that of the impending Western Australian Small Business Commissioner.

Given these significant concerns, the SBDC would prefer to discuss alternative approaches with the Commonwealth Government to support small businesses in the resolution of business-to-business disputes. In our opinion, a collaborative approach across jurisdictions to this issue is needed to ensure the best outcomes for the small business sector eventuate.

Should you wish to discuss this submission in more detail, please contact Mr Daniel Hawkins, Senior Policy and Advocacy Officer, on (08) 6552 3304 or email daniel.hawkins@smallbusiness.wa.gov.au.

Yours sincerely



Jacky Finlayson
A/MANAGING DIRECTOR

6 July 2011