



THE LAW SOCIETY  
OF NEW SOUTH WALES

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28 May 2014

Manager, Small Business Ombudsman and Procurement Unit  
Small Business, Competition and Consumer Policy Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600

By email: [small.business@treasury.gov.au](mailto:small.business@treasury.gov.au)

Dear Sir/Madam,

### **The Small Business and Family Enterprise Ombudsman Discussion Paper**

I am writing to you at the request of the Law Society's Dispute Resolution Committee ("Committee"). The Committee is comprised of practising solicitors and nationally accredited mediators, and represents the Law Society on dispute resolution issues as they relate to the legal profession in New South Wales.

The Committee appreciates the opportunity to provide comments in response to the Small Business and Family Enterprise Ombudsman Discussion Paper.

#### **Avoidance of duplication of processes**

It is in the interests of all parties and the State to have disputes resolved with a minimum investment of time and cost.

There are already a wide range of dispute resolution mechanisms available. Given the wide range of public and private dispute resolution services available, the Committee supports a review of existing dispute resolution services in the States and Commonwealth to ensure that existing services are relevant, accessible, and efficient mechanisms for dealing with small business disputes. The Committee notes that this may involve consideration of existing State based programs, such as the program that is administered by the NSW Small Business Commissioner, and programs administered under the Franchising Code, the Horticulture Code, the Oil Code and the Unit Pricing Code, as well as programs provided by Courts and Tribunals. A review of existing practices and procedures might assist in determining the scale of the real problems experienced by small businesses.

#### **Compulsory mediation**

Mediation can be a useful mechanism for resolving disputes. The Committee supports the approach taken by the Administrative Appeals Tribunal which is to make mediation the default position for all matters, with judicial discretion to vary the position in appropriate circumstances.

### **Access to legal services**

It is important for small businesses to have access to good quality legal advice. Decisions whether to mediate or litigate need to be made on the basis of good advice as the consequences of the decision can be far reaching. Any new process should not exclude access to legal services. Furthermore, any new dispute resolution services should be provided by suitably qualified and independent dispute resolution practitioners. Those providing concierge or triage services must be well trained and resourced, not just in dispute resolution programs, but in negotiation and dispute resolution techniques. Good quality early advice about dispute resolution options leads to quicker resolution in many cases, which results in lower costs to small businesses.

The Committee responds specifically to the focus questions under the heading 'Concierge for dispute resolution' below.

### **Question 1**

**What should the scope of the Ombudsman's own mediation service include? For example, small business disputes with Australian Government agencies or disputes under industry codes of conduct?**

As outlined above, there are many existing small business dispute resolution services.

The Committee does not support the creation of a new service unless there is some consolidation of existing services.

The range of disputes should not be limited.

In the Committee's view, disputes with Australian Government agencies should be part of the service and the Government should commit to using dispute resolution services rather than the Courts, unless there is a compelling reason for engaging in litigation.

### **Question 2**

**What powers should be conferred to the Ombudsman to resolve small business disputes?**

The Committee does not support an Ombudsman exercising an administrative function to determine disputes. In the Committee's view, a more appropriate power may be to offer the evaluation of disputes that may be binding on some parties (for instance Government agencies) but not on small business.

### **Question 3**

**Which types of dispute resolution services should the Ombudsman provide and what should be the model for providing these services? For example, should these services be outsourced or provided in-house?**

See above. The Committee supports independent dispute resolution services offered by specialist dispute resolution practitioners with the appropriate skills, training and experience. The Committee does not support dispute resolution services being the core business of the Ombudsman.

The dispute resolution role of any service needs to be coordinated with the other roles, and data and information about small business needs and values should be obtained so that the value of the concierge and dispute resolution service can be measured. The dispute resolution program needs to be carefully designed, implemented, and monitored to ensure value to small business.

In the Committee's view, dispute resolution services are best provided by suitably qualified and independent dispute resolution practitioners, rather than government employed dispute resolution practitioners who are often seen as having a vested interest in settlement to "save costs", or may not have practical experience in dispute resolution. Those providing concierge or triage services must be well trained and resourced, not just in dispute resolution programs, but in negotiation and dispute resolution techniques. The dispute resolution practitioners should also be accredited under various accreditation schemes and have experience in dealing with small business disputes. In the Committee's experience, good early advice about dispute resolution options leads to early resolution in many cases, which results in lower costs to small businesses.

Education outreach and capacity building in small businesses is important to successful application of dispute resolution techniques. Small businesses need to be educated to understand that dispute resolution processes such as mediation are a chance to make decisions about whether or not litigation is appropriate for their dispute. In the Committee's view, good concierge services are about assisting clients make their own decisions, not making those decisions for them.

It is also important for lawyers to support dispute resolution services for small business, which will involve education and capacity building. While lawyers should not be excluded from dispute resolution programs, it should be possible for small business to engage in dispute resolution without lawyers if they choose to do so.

Where small businesses cannot afford legal assistance, appropriate financial assistance or bono legal advice should be available to ensure that the party is not disempowered by the dispute resolution service.

### **Conclusion**

The Committee thanks you for the opportunity to comment. If you have any questions please feel free to contact Menaka Venkata, policy lawyer for the Committee on [menaka.venkata@lawsociety.com.au](mailto:menaka.venkata@lawsociety.com.au) or (02) 9926 0214.

Yours sincerely,



Ros Everett  
**President**