

## Civil Litigation Committee

### Submission to the Australian Government: Small Business Disputes Options Paper

**1 July 2011**

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## The Committee

The NSW Young Lawyers' Civil Litigation Committee (**the Committee**) comprises young lawyers, either under the age of 36 or in their first five years of practice and law students, all of whom practice or have an interest in civil litigation.

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## Issues addressed in this submission

The Committee has had the opportunity to read and consider the Australian Government Resolution of Small Business Disputes Options Paper released May 2011 (**the Options Paper**).

In this submission, the Committee will respond generally to Options 1-4 contained in the Options Paper under the following headings:

1. Defining 'small business' and 'small business dispute'
2. Current availability of similar existing services and the impact of the Options on those services
3. Right of appeal
4. Costs comparison between similar existing services and the Options
5. Whether the Options support recent and continuing changes in litigious culture
6. Summary

The Committee understands that the Options are presented as alternatives.

The Committee's submissions in relation to the above questions and proposals are set out in detail below.

## Defining ‘small business’ and ‘small business dispute’

The Committee is of the view that there may be ambiguity as to whether the Options Paper intended its scope to include ‘disputes relating to small businesses’ or ‘business disputes that are small’, and questions whether a definition is necessary.

The Committee notes comparable legislation in other jurisdictions does not provide a definitional distinction, for example in the *Small Business Commissioner Act 2003 (Victoria)* (which established the Victorian Small Business Commissioner), there is no definition of either the size of the businesses or the size disputes falling within its scope.

It is the Committee’s view that the answer to the question depends on which of the four Options is being discussed.

Option 1, The National Information and Referral Service, largely involves the setting up of a telephone hotline and website, whereby businesses may obtain information and referrals to already existing dispute resolution services. For these purposes, it may not be necessary or appropriate to provide a definition as above. It may prove cumbersome for a telephone hotline to ask about the size of the business or the dispute before providing a referral. Similarly, applying a definition to a website may generally be impractical unless there is a way of accurately limiting access to a particular scope of user based on the size of their business or dispute. However, in designing the services discussed in Option 1, it would be important to bear in mind whether the services are aimed at assisting small businesses, or to assist in the resolution of small disputes, in order to ensure that the services are appropriately targeted.

In respect of Options 2 to 4, it is apparent that more substantial engagements with the users of those services are envisaged. Further, with the greater amount of resources being used under Options 2 to 4, it becomes important that some definitions are adopted to ensure that the services supplied are accurately focused on the intended area of need.

There is a multitude of different definitions of ‘small business’ that have been adopted in various legislative contexts. The most common of these involve setting some parameters for the scope of businesses according to employee numbers, income or assets.

Alternatively, in other contexts, legislators define the relevant scope by reference to the size of the disputes. For example, in New South Wales, the Small Claims Division of the Local Court has jurisdiction to only handle matters where the amount in dispute is up to \$10,000.00, with larger disputes being dealt with in the General Division of the Local Court (or other higher courts as appropriate).

All of the States and Territories have special Courts or divisions that have been established to provide streamlined procedures appropriate for small-scale disputes. It is appropriate to consider each under the proposal of a National scheme:

|                              |  |             |
|------------------------------|--|-------------|
| Australian Capital Territory | Small Claims Court   | \$10,000.00 |
| New South Wales              | Small Claims Division, Local Court                                   | \$10,000.00 |
| Northern Territory           | Small Claims Division, Local Court                                   | \$10,000.00 |
| Queensland                   | Minor civil disputes jurisdiction, Civil and Administrative Tribunal | \$25,000.00 |
| South Australia              | Civil (Minor Claims) jurisdiction, Magistrates Court                 | \$6,000.00  |
| Tasmania                     | Minor Civil Claims, Magistrates Court                                | \$5,000.00  |
| Western Australia            | Minor Civil Claims, Magistrates Court                                | \$10,000.00 |

The Committee’s submission is that if Options 2, 3 or 4 are adopted, to ensure services are appropriately focused, a combined test should be employed. That combined test

should define both the size of the business which can lodge a complaint and the size of the dispute.

The Committee submits a relatively simple comparison definition in respect of business size may be the definition of a 'small business employer' for unfair dismissal purposes under the *Fair Work Act 2009*. Therein, a 'small business employer' is defined as one that employs less than 15 persons by individual head count (in contrast to 15 full time employees). Although there are many other ways that this could be defined, the Committee submits this definition is to be preferred for Options 2, 3 or 4, given its simplicity, particularly when compared with tests using income or assets as the benchmark.

In regards to the size of the dispute, it is submitted that if the upper limit is kept to \$10,000, this would be generally consistent with most of the jurisdictional limits for minor claims across the States and Territories as shown above. However, it may be that it is time to review this figure generally. The Committee's view is that consistency across jurisdictions is important, rather than that \$10,000 is the most appropriate amount.

## Current availability of similar existing services and the impact of the Options on those services

The Committee notes that there is a range of other services within New South Wales which offer forums for disputes involving small business to be ventilated and resolved.

In light of the services available to small business in New South Wales, the Committee is of the view that it is unnecessary to establish a National Small Business Tribunal (Option 3). The Committee expects that the cost to formulate the jurisdictional limits and establishment of this service will far outweigh the benefits which may result. A small business in New South Wales has a number of options available to it when it encounters a dispute, including commencing proceedings in the Local Court or filing an application in the Consumer, Trader and Tenancy Tribunal or Retail Tenancy Unit. All these options provide some form of alternative dispute resolution service which can be accessed by a small business, usually at little or no cost. The difficulty, in the view of the Committee, is the lack of information available to small business to assist to select the appropriate forum to adjudicate its dispute.

In the Committee's view, the broad range of dispute resolution services available in New South Wales is sufficient to respond adequately to any disputes that arise in a small business context. The Committee suspects that small business is, through lack of awareness, oblivious to the type and breadth of services available. Instead of creating new services, the Committee recommends that the Government embark upon an awareness campaign identifying the services available to small business to resolve any disputes that arise in the ordinary course of business.

The Committee is concerned the implementation of any of the Options would provide a duplication of existing similar services, which would in turn provide confusion and greater cost, unless all State or Territory-specific schemes are abolished in favour of a singular National scheme.

## Right of appeal

The Committee recommends that the right of appeal proposed (if any) in respect of the four Options be clarified.

Option 1 provides an information and assistance service only, therefore contact would not involve any decision making or adjudication. The right of appeal would be irrelevant.

Option 2 offers a mediation service, with a mediator who would be randomly chosen from a panel, and no appeal rights would exist for a party to a dispute to challenge the selection of particular mediator (unless a conflict of interest arises). Any decision arising out of the mediation is one the parties have agreed to together, but should a party fail to adhere to any agreement arising out of the mediation, a right to seek adjudication and orders from a National Small Business Tribunal may be warranted.

It is the Committee's view that any decision of the National Small Business Tribunal (Option 3) should be final and binding, with the exception of allowing appeals on the limited basis of error on a question of law, denial of procedural fairness, lack of jurisdiction or other jurisdictional error. The Committee recommends parties should have liberty to lodge such an appeal within 28 days of a determination, and that an appeal should be conducted on the papers, allowing parties the opportunity to file written submissions. The National Small Business Tribunal should also have power to hear and decide appeals. The Committee submits the parties to a dispute should be allowed the right to legal representation without leave before the National Small Business Tribunal.

In respect of Option 4, the role of the Small Business Advocate would be to bring issues facing small businesses to the attention of the Australian Government. As such no appeal issues would arise.

## Costs impact of the Options

In the absence of any firm proposal, the Committee will not express a firm view as to a comparison of the costs to the parties of any National scheme compared to existing services.

However, it should be borne in mind that there may be significant costs in setting up new services (even referral services). This should be taken into account in formulating any proposed new service.

## Whether the Options support recent and continuing changes in litigious culture

Recent State and Federal legislative amendments reflecting changes in litigation culture place a greater focus on early dispute resolution in civil disputes. Providing additional methods for resolving disputes for small businesses, or creating a more streamlined approach to resolving such disputes, supports the aforementioned legislative amendments.

The Committee proposes that any of the Options which are implemented should utilise the skills of legal professionals, who are trained to deal with conflict in commercial contexts, where this is appropriate and adaptable to the goals and procedures of the Options. For example, legal representatives through Committees (such as this one) or organisations (such as the New South Wales Law Society) could be involved in orientation sessions or feedback discussions upon implementation of a National scheme. The Committee notes that it is frequently younger legal practitioners (in either age or experience) who handle small business disputes for clients, often on delegation by more experienced practitioners. As a result, there is a particular need for the skills of younger legal practitioners to be utilised in any new National scheme.

It is crucial that any referral to mediation under the Options carefully matches the right type of mediator with each small business dispute, particularly in respect of cost effectiveness.



## Summary

Whilst the Committee supports a more streamlined approach to both dispute resolution and the handling of small business disputes, it is concerned that a National scheme using all the Options contained in the Options Paper will simply create confusion and duplication, and will not provide a more satisfactory structure than already exists in the States and Territories.

The Committee recognises that there is already a broad range of alternative dispute resolution services available to small business to resolve any disputes that arise in the ordinary course of business. It recommends that the Government embark upon an awareness campaign to make small business more aware of these services and raise the usage of the ample services that are already available. Furthermore, the Committee notes attention must be paid to properly defining the intended scope of the Options Paper, as well as exploring costs and rights of appeal, particularly under Option 3.

The Committee understands that the Options have been presented as alternatives and, with this in mind, notes that, whilst services such as those envisaged by Options 1 and 2 might be useful in guiding small business disputants to appropriate avenues to handle those disputes, the Committee submits the creation of a National Small Business Tribunal under Option 3 or a Small Business Advocate under Option 4 is unnecessary.