

**APESMA comments on the  
Department of Innovation, Industry, Science and Research  
Resolution of Small Business Disputes**

**Options paper**



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Submitted by

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### **Preamble**

The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) is committed to protecting and advancing the interests of its self-employed members. This includes representing their views and interests in relation to development of Government services targeted at micro and small enterprises (MSEs); options for improving the resolution of small business disputes is clearly one of these issues.

We consider it critical that we play an active and considered role in responding to the challenges and changing patterns in the Australian labour market by supporting those who choose to move into commercially-based as well as employee-based work arrangements. Combined with a comprehensive range of employment-related services, APESMA and Connect - APESMA's special interest group for self-employed professionals - assist engineering, science and technology and other professionals to operate as MSEs. These professionals play a critical role in the dispersal of Australia's professional engineering, science and technology capability across industries including Defence, IT, Local Government, Mining, Power, Roads, Transport, Water and Telecommunications.

We thank you for the opportunity to make a brief comment on the Options paper on behalf of these members.

### **Section 1 - Background and introduction**

APESMA is an organisation registered under the Fair Work Act 2009 representing over 25,000 professionals including professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers and transport professionals throughout Australia. In 1995, the Australian Industrial Relations Commission approved the amendment of APESMA's eligibility rules to provide coverage for independent contractors. APESMA can cover any professional engaged as an independent contractor who would be eligible for membership of the Association if they were an employee performing the same work.

As the only industrial association representing exclusively the industrial and professional interests of these professionals, assisting those who operate as self-employed contractors or micro-businesses is fundamental to APESMA's contemporary approach to representing the diverse interests of its professional membership.

In the late 1990s, in response to changes in the labour market<sup>1</sup>, extensive outsourcing, downsizing and contracting out largely in state-owned instrumentalities and the Australian Public Service, and the significant and growing number of consulting professionals setting themselves up as micro-businesses, APESMA allocated significant resources to providing targeted services to these members. Since that time, the number of self-employed APESMA members has grown to more than 3,500. Around 50 per cent of these operate through a company structure, around 40 per cent operate as sole traders and around 7 per cent operate through a partnership or trust. Of those that operate through a company structure, most are micro-businesses while a small number own and manage small businesses generally with fewer than five employees. The scope of our comments is therefore restricted to MSEs.

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<sup>1</sup> The Australian Bureau of Statistics 2009 *Forms of Employment Survey* found that over one million Australian workers were engaged as independent contractors.<sup>1</sup> Of these, 15 per cent worked in the Professional, Scientific and Technical services industry, second only to the Construction industry. These figures confirm 2001 Productivity Commission data which estimated that around 10 per cent of self-employed contractors were professionals, a high proportion relative to other occupational groups.

Services to APESMA's self-employed members are provided via the Connect special interest group and include:

- advice on business startup and managing the transition from employee to consultant;
- information and advice on risk management practices and documentation;
- access to discounted professional indemnity insurance;
- a business mentoring program which matches experienced self-employed professionals with those transitioning to self-employment;
- provision of a demand for payment letter from a solicitor;
- information on recommended hourly rates;
- review of contracts for service by a solicitor with commercial expertise;
- assistance with the Alienation of Personal Services Income tax rules;
- information on business planning, invoicing, preparing cash flow statements, etc.;
- networking services; and
- a professional development scholarship to assist with expanding and updating skills in the absence of a sponsoring employer.

APESMA offers these services through a comprehensive website of resources and information which is available at [www.apesma.asn.au/connect](http://www.apesma.asn.au/connect).

## **Section 2 - APESMA support for investigating options for improved resolution of small business disputes**

APESMA is of the view that access to affordable and timely dispute resolution is critical to supporting MSE's. We therefore strongly support Government investigating options for improving the resolution of business to business disputes.

## **Section 3 - Assessment of options against key dispute areas**

### **(a) Criteria by which APESMA assessed the options**

The Association holds the view that the option/s selected should:

- provide a national framework for accessible, prompt and low cost dispute resolution;
- ensure existing services are not duplicated;
- supplement existing services where needed;
- keep disputes for which existing dispute resolution mechanisms don't exist out of the court system where possible;
- address the current lack of awareness of dispute resolution services available; and
- address the gaps in current services.

### **(b) Key areas of business disputation for professionals operating MSEs**

This section sets out the most prevalent types of disputes in which APESMA's self-employed members are involved, notes whether or not existing services/tribunals are regarded as appropriate for hearing and resolving disputes, and if not, draws a conclusion about how the alternatives set out in the Options paper might assist.

#### **Debt collection**

It is widely recognised that MSEs have been severely affected by the global economic downturn of 2009/10<sup>2</sup> and more recently natural disasters. Together they have resulted in a marked increase in MSE debt levels, and a shortage of debt finance. In the current economic environment, one of the primary concerns of professionals operating MSEs is the stability of their consultancy firms. Unpaid invoices which interrupt cash flow can severely compromise their stability. This makes efficient and effective dispute resolution mechanisms in this area absolutely critical.

Anecdotal APESMA data suggest that the prevalence of disputes in relation to unpaid debts has increased. In the last three years, the Association has been called on to support a total of nine professionals in relation to unpaid debts or late payment of bills by a business customer in the 2010/11 period, compared with only two in the 12 months prior to that.

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<sup>2</sup> Hodorogel, R.G. (2009). The Economic Crisis and its Effects on SMEs. Theoretical and Applied Economics, 79-88.

APESMA's Survey of Independent Contractors<sup>3</sup> indicated that client behaviour, including difficulties with clients paying, was a significant issue for 28 per cent of respondents.

The escalation in disputes around debt collection is borne out by the Australian Taxation Office's recent findings that there has been an increase in MSE debt as well as increasing difficulty in collecting debts.<sup>4</sup> It was also confirmed in the Victorian Department of Justice's report 'Dispute Resolution in Victoria'<sup>5</sup> which found that the most prevalent dispute category was "unpaid debts or late payment of bills owed .. by a customer".

Worth noting in the contemporary digital business environment is the fact that many of APESMA's self-employed members offer their professional services in a state other than that which they are based using the internet and other forms of communications technology. Dispute resolution and mediation services in relation to debt collection and unpaid invoices must therefore be offered on an inter or cross-state basis.

Access to a referral service as set out in Option 1 of the Options paper would be welcomed by both members wanting to resolve their debt-related disputes and the Association to assist with improved referral for members involved in payment and debt collection difficulties. Where a gap exists, provision for mediation as set out in Option 2 would be of assistance.

#### **PSI disputes**

The APESMA 2009 survey of independent contractors found that the Alienation of Personal Services Income rules were a concern for almost 35 per cent of respondents.

A number of our members since the introduction of the legislation in 2000 have been in dispute with the Australian Taxation Office around their Personal Services Business status. While access to the Administrative Appeals Tribunal can be long-winded and is not a costs-free jurisdiction, we accept that this is the appropriate tribunal to deal with these matters.

#### **Contract for service disputes**

The Association holds the view that improved business to business dispute resolution options should occur in the context of fair contract terms. The primary difficulties experienced by APESMA's self-employed members are outer limit contracts purporting to be fixed term contracts (meaning the engagement of professionals can be terminated with little or no notice), and the lack of opportunity to negotiate contract terms. The Association accepts that the Courts are generally the appropriate forums for enforcing the unfair contract provisions of the Independent Contractors Act 2006 and dealing with these disputes. We believe that where they are not currently available, mediation services should supplement existing services to ensure the sensitive circumstances can be involved in commercial contract disputes, and very often the need for the parties to deal with each other on an ongoing basis, are acknowledged. Provision for referral and mediation as set out in Option 2 would be appropriate.

#### **Section 4- Preferred options based on gaps in existing services evidenced**

Based on the most prevalent types of disputes which arise in the case of APESMA's self-employed members, the most significant gap appears to be in relation to increasing awareness of dispute resolution services and ensuring that appropriate mediation is made available where a gap exists in relation to unpaid invoices and debt collection matters. Option 2 appears to be the most appropriate way to address the issues. Secondly, ensuring that appropriate mediation is available in unfair contract matters if and when a gap exists, again as set out in Option 2, would be useful.

In broader terms, APESMA is of the view that it would be desirable to undertake national monitoring of, and research into, access to and effectiveness of existing and new dispute resolution services.

#### **Submission preparation**

This Submission was prepared by Dr. Kim Rickard, Executive Officer, Connect - APESMA's special interest group for independent contractors and consultants (email: [krickard@apesma.asn.au](mailto:krickard@apesma.asn.au)).

<sup>3</sup> Survey of Independent Contractors and Consultants: a report by the Association of Professional Engineers, Scientists and Managers, Australia. Available at [http://www.apesma.asn.au/employment/connect/pdfs/survey\\_report\\_2009.pdf](http://www.apesma.asn.au/employment/connect/pdfs/survey_report_2009.pdf)

<sup>4</sup> Thomson Reuters Weekly Tax Bulletin, Issue 22, 27 May 2011

<sup>5</sup> Victorian Department of Justice, Dispute Resolution in Victoria: Small Business Survey 2007. Available at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Reports\\_and\\_Guidelines\\_2/\\$file/Dispute%20Resolution%20in%20Victoria%20-%20Small%20Business%20Survey%202007%20\(Chapters%201%20-%202\).pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/Dispute%20Resolution%20in%20Victoria%20-%20Small%20Business%20Survey%202007%20(Chapters%201%20-%202).pdf)