



The Pharmacy
Guild of Australia

RESPONSE TO THE *SMALL BUSINESS DISPUTES OPTIONS PAPER*

National Secretariat

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Introduction

- 1.1 The Pharmacy Guild of Australia (**the Guild**) is pleased to respond to the Government's *Small Business Disputes- Options Paper (the options paper)*.
- 1.2 The Pharmacy Guild of Australia is a national employers' organization currently registered under the Fair Work (Registered Organisations) Act 2009 which functions as a single entity rather than a federation. It was first established in 1928 and currently has Branches in every State and Territory.
- 1.3 The Guild's members are the pharmacist proprietors of some 4,500 community pharmacies, which are small retail businesses operating throughout Australia. Almost 80% of all pharmacist proprietors are Guild members.
- 1.4 Community pharmacy makes a significant contribution to the Australian economy with an annual turnover of \$12billion and employing some 50,000 people.
- 1.5 The Guild has long had an interest in the development of commercial law in Australia as it affects small businesses such as community pharmacy.
- 1.6 It has participated in inquiries such as the Productivity Commission Inquiry into Retail Tenancies, a submission to the Expert Panel established by the Government in 2009 to examine (amongst other things) the unconscionable conduct provisions of the *Trade Practices Act 1974 (the Act)* and the Senate Economics Committee inquiry into the Unconscionable Conduct
- 1.7 It also provided a submission to the Senate Economics Committee inquiry into the Australian Consumer Law (No.2).

1.8 The Guild has long held the view that 'unfair contracts' between large businesses (particularly corporations operating larger shopping centres) and smaller businesses should be capable of review by an independent body.

1.9 It's broad view was reflected in the Senate Economic Legislation Committee's Report *Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions]* where it said:

4.42 Ms Ann Dalton of the Pharmacy Guild argued that:

...the protection offered by the unconscionable conduct provisions currently contained in the Trade Practices Act are illusory, and for that reason was pleased that the Australian Consumer Law at least proposed to cover unfair standard form business-to-business contracts when it was first circulated. Like many other small business groups, such as the Motor Trades Association of Australia, the guild is disappointed that the provision was removed at the last moment. The guild supports the view of the nongovernment senators expressed in the Birdsville amendments inquiry conducted by this committee, in which they called for the Victorian legislative framework for consumer transactions to be extended to cover business-to-business relationships involving small business.

4.43 The Pharmacy Guild recommended removing the unconscionable conduct provisions of the TPA and framing the Australian Consumer Law 'in a manner similar to section 12 of the Independent Contractors Act'. This section permits reviews of contracts that are generally unfair or harsh and uses the term 'unfair' without any statutory extension.¹

1.10 The Guild is pleased the Government appears to be changing its position.

¹ Page 24

1.11 The first example of change was the late acceptance of amendments to the Australian Consumer Law to apply it to business to business contracts for the supply of goods to end users, and all contracts for the supply of services, where the contract price does not exceed \$40,000.

1.12 The second is the publication of the options paper. As noted in the Minister's forward:

My approach is to bring about a national dispute resolution service that makes the process accessible, prompt and as low cost as possible for small business users. This is consistent with the Government's *Strategic Framework for Access to Justice in the Federal Civil Justice System*.²

1.13 The Guild notes the *Strategic Framework* paper says in part:

External Dispute Resolution

EDR schemes can offer cheap and flexible approaches to dispute resolution for business and consumers. EDR gives consumers a responsive complaint and dispute resolution scheme, and there are no costs to the customer if he/she is unsuccessful. Additionally, businesses benefit from continuous improvement to best business practice. EDR schemes also give industries responsibility for maintaining their own system and standards of access to justice, encouraging compliance and change in corporate culture.

There is a high level of acceptance of current EDR schemes by industry and consumer groups, with high levels of perceived fairness and satisfaction with the outcomes. Dispute resolution standards are usually maintained as a condition imposed by an industry regulator.

Given the benefits of EDR schemes, the capacity to encompass a broader range of disputes should be explored. This would assist consumers and businesses to resolve relatively small disputes quickly and cheaply. This could be achieved by identifying industries that have a need and capacity for an EDR scheme, with a view to potentially extending the use of the EDR model in the future. In particular, it would include

² Page iii

industries where there is a significant imbalance in power and resources between the service provider and customer, where traditional dispute resolution mechanisms and litigation may not be feasible.

The TIO (Telecommunication Industry Ombudsman) and Financial Ombudsman Service note that many of their members are small (and some micro) businesses. Given the broad support for industry ombudsmen and forms of EDR, there may be benefit in extending the scope of EDR schemes to business-to-business disputes, at least where one of the parties is a small business. (emphasis added)³

with recommendation 7.2 of the *Framework* recorded as being:

External dispute resolution schemes should be available to deal with disputes involving small businesses, and not just complaints between customers and businesses.

1.14 The Guild agrees.

1.15 The next part of this paper reviews the options contained in the current government paper.

³ Pages 88-89

Consideration of the options

2.1 The Guild believes the development of a service along the lines of the Superannuation Complaints Tribunal (as suggested in the options paper) is a combination of the paper's options 2 and 3 that would offer small business a cost efficient dispute resolution mechanism and is therefore something that can be developed into a legislative model that can be considered by stakeholders in this area.

2.2 Page 18 of the options paper says:

If the parties are not able to resolve their dispute following conciliation, they may ask the NSBT to make a decision for them, following a review of the history of the dispute. At this stage, NSBT members will review the history of the dispute and then determine an outcome. The parties will agree to be bound by the decision of the NSBT. Similar to the Superannuation Complaints Tribunal, if a party disputes the NSBT's decision, they may apply to the Federal Magistrates Court on a point of law.

2.3 The Tribunal determines matters firstly, through conciliation, and then through a formal review leading to the making of a binding determination and is under a statutory obligation to be fair, economical, informal and quick.

2.4 As such, the model combines the advantages of option 2 (a national dispute resolution service) and option 3 (a Tribunal) as well as offering a 'one stop shop' as to where a small business can go if, after making its own effort to resolve a dispute, a conciliation and arbitration process is necessary to resolve matters.

2.5 The Guild would suggest that any compulsory conciliation prior to seeking a binding determination should be conducted within a fixed period of time (say 90 days), which could be extended in special cases.

2.6 This is because as the options paper says on page 1:

For small businesses with limited resources, it can be the time taken away from core business that is the most costly part of the dispute resolution process. Much of the time can be consumed in simply finding the most appropriate dispute resolution mechanism. Clearly, anything that helps small businesses spend less time and money resolving disputes also assists small businesses to remain focussed on growing their business.

2.7 Presuming the 'tribunal':

- (a) well funded to deal with complaints in a prompt manner;
- (b) has sufficient jurisdiction to deal with small business issues; and
- (c) operates in a manner similar to the Superannuation Complaints Tribunal, as explained in pages 14 – 18 of the publication *The Superannuation Complaints Tribunal....How It Can Help You* (2009)

it will build a reputation as the 'go to' resource for small business to have business disputes resolved, which will lower transaction costs involved in having to search the market place to ascertain how a business dispute can be conveniently resolved.

2.8 Finally, given any tribunal model developed along the lines of the Superannuation Complaints Tribunal has both a conciliation and arbitration function and generally operates without intervention from lawyers, the name of the 'tribunal' should properly reflect the manner in which the proposed entity is to operate.

2.9 The Guild recommends any proposed national small business tribunal should be called the **Small Business Dispute Resolution Service**.

Jurisdiction

3.1 The Guild agrees with the observation in the options paper that:

To avoid duplication of existing services, the jurisdiction of the NSBT must be clear. It is envisaged that stringent jurisdictional and standing provisions would be built into legislation establishing the NSBT. These provisions would be clear about who can use the services of the NSBT, the financial thresholds of matters to be dealt with as well as the types of matters the NSBT would hear⁴

and

It is envisaged that the NSBT would deal exclusively with small business (business-to-business) disputes. This would include matters such as the non payment for goods and services or other contractual disputes. This would confer jurisdiction on a Commonwealth tribunal in matters which are currently dealt with at the state level. The legislative and constitutional implications of this require further examination.⁵

3.2 The Guild believes a business with a turnover of \$3m p.a (indexed) with a (common law) contractual dispute with a constitutional corporation should be able to use the Tribunal to have the dispute determined.

3.3 This turnover qualification is similar to that required to gain access to the unconscionable conduct provisions contained in Part IVA of the old *Trade Practices Act*.

3.4 The requirement for the involvement of a constitutional corporation provides an amplitude of constitutionality for the NSBT given the finding of the majority of the High Court in the *Workchoices* case⁶ that the corporations power of the *Constitution* extended to the regulation of the activities, functions, relationships and the business of a corporation; the power to legislate under the corporations power would therefore

⁴ Page 19

⁵ Ibid

⁶ *New South Wales v. Commonwealth (WorkChoices)* 231 ALR 1

more likely than not extend to business disputes involving a constitutional corporation and incorporated and unincorporated small businesses.

- 3.5 The Guild would recommend the Tribunal should also be given jurisdiction to review decisions that flow from the operation of commonwealth law that create rights and obligations that impact business to business relationships.
- 3.6 When the Administrative Appeals Act was established in 1975, the *Administrative Appeals Tribunal Act* contained a Schedule listing the decisions the Tribunal could review. Something similar could be done for the NSBT.
- 3.7 One such decision would be whether a particular contract is an 'unfair' contract, as the term 'unfair' is currently defined in the Australian Consumer Law.
- 3.8 This is because it would be a curious thing if 'contractual' disputes could be resolved through the proposed tribunal but not whether a particular contract should be characterised as being 'unfair' under the Australian Consumer Law.

Scoping out of retail tenancy agreements

4.1 The Guild is disappointed retail tenancy disputes have been scoped out of the proposed tribunal given page 19 of the options paper says:

The majority of small business disputes relate to retail tenancy and franchising matters. Consultation has suggested that these disputes are best dealt with by existing state mechanisms, such as the Office of Franchising Mediation Adviser or the Retail Tenancy Unit of New South Wales Fair Trading. (emphasis added)

4.2 The Guild has long been concerned about the dichotomy of bargaining power between larger businesses and small businesses such as pharmacies, particularly as it relates to the negotiation of retail leases with the large corporations operating shopping centres (particularly) in the growth corridors of Australia's major cities.

4.3 Approximately 98% of all community pharmacy owners, are required to enter into negotiations with landlords to establish the terms of their lease, as very few pharmacists own the premises from which they conduct their business. For this reason, unconscionable conduct in negotiations on retail tenancy is a very significant issue for community pharmacy.

4.4 The Guild would be interested as to the nature of the 'consultation' that led to the conclusion that state mechanisms should be retained.

4.5 The Guild strongly recommends reconsidering removing from the scope of the proposed tribunal retail tenancy disputes.

4.6 It is nevertheless noted that state and territory jurisdictions have developed sophisticated mechanisms to determine retail tenancy disputes.

- 4.7 In some jurisdictions an entity like the Victorian Small Business Commissioner has the capacity to not only conciliate tenancy disputes but also have capacity to arbitrate in some areas such as disputes relating to fit out costs.⁷
- 4.8 The Guild recommends that if retail tenancy disputes cannot be heard by the proposed NSBT, states and territories should empower (in those jurisdictions where they are established) small business commissioners to conciliate and where necessary arbitrate all retail tenancy disputes including those relating to unconscionable conduct.⁸
- 4.9 The Guild is happy to assist the Government in the development of this project.

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⁷ Subsections 30(4) and (5) of the *Retail Leases Act 2003* (Vic)

⁸ That includes for instance, unconscionable conduct regulated by provisions such as those contained in Part 7A of the *Retail Leases Act 1994* (NSW)