



Australian Government

RESOLUTION OF SMALL BUSINESS DISPUTES

OPTIONS PAPER | MAY 2011

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CONSULTATION PROCESS

Request for feedback and comments

The Government is seeking your feedback and comments on the options outlined in this paper. The options have not received Government approval and are not law. Feedback and comments received will help to inform the Government's proposed approach on the way forward.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please email responses in a Word or RTF format. You are welcome to submit an additional PDF version.

Closing date for feedback: *Thursday 30 June 2011*

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APPENDIX 1 - AUSTRALIAN SMALL BUSINESS DISPUTE RESOLUTION SERVICES



FOREWORD

I am pleased to release for comment this options paper that seeks stakeholder views on ways to assist small businesses resolve their disputes with other businesses.

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*. There are many models that can be considered within these parameters.

Small business disputes often revolve around the payment of money for goods and services. As our economy continues to recover from the global economic downturn, helping small businesses maintain much needed cash-flow can be critical for their survival. If the process to achieve resolution of a dispute is slow and costly, it can have serious cash-flow consequences and distract small business owners from the day-to-day work of growing their business.

The options canvassed in this paper are supported by information already known about small business disputes. The context for each option is to ensure that it does not duplicate or overlap existing mechanisms. The evidence already gathered helps to ensure that each option complements, enhances and, where necessary, supplements the existing system of public, private and industry based dispute resolution mechanisms.

Options one and two focus on the range of options currently available to small business, in particular their awareness of them. The approach is to use referral, education and dispute assistance services to ensure there are no gaps in the range of dispute resolution options.

Options three and four take a more expansive view of the scope for a national service. These options are intended to encourage feedback on a tailored role for the Commonwealth in analysing, advising and advocating on improvements to the public and private system of dispute resolution services available to small business. They also canvass the merits of combining this approach with a direct dispute resolution function for those instances where no appropriate mechanism exists.

The Gillard Government is committed to ensuring the ongoing health of the small business sector. Your feedback on the options outlined in this paper will help to make sure small businesses are equipped to respond to one of the key business management challenges.

A handwritten signature in black ink, appearing to read 'Nick Sherry'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Senator Nick Sherry

Minister for Small Business

SUMMARY OF OPTIONS

OPTION ONE – NATIONAL INFORMATION AND REFERRAL SERVICE

The National Information and Referral Service would provide a telephone hotline and website to direct small businesses to relevant existing dispute resolution services. This national, centralised referral service would provide information on what services are currently available in the relevant state or territory. Callers to the hotline would be guided through dispute resolution options and then referred to the appropriate existing service in their state or territory. This option could build on the services already offered by the Small Business Support Line and Advisor Finder.

OPTION TWO – NATIONAL DISPUTE RESOLUTION SERVICE

The National Dispute Resolution Service would provide an information and referral service similar to option one, but would also offer a mediation service where no appropriate low cost dispute resolution service exists. This option would provide dispute resolution information through a website and telephone hotline. Operators would discuss dispute resolution with callers and direct them to appropriate existing services in their state or territory. If no appropriate service exists, a mediator drawn from a standing panel would assist small businesses with their dispute. This option would also offer an awareness and education campaign, which would target specific sectors with a high incidence of disputes.

OPTION THREE – NATIONAL SMALL BUSINESS TRIBUNAL

A new Commonwealth tribunal, the National Small Business Tribunal, would be established specifically to resolve small business disputes. The tribunal would have the powers of investigation, conciliation and review, which would be backed by new Commonwealth legislation. Whilst it would provide coverage for a wide range of disputes, it would not deal with code of conduct matters or retail tenancy disputes. This option would provide a national network and a one stop shop approach for small businesses with disputes. The tribunal would be based in a capital city and could potentially use existing federal court infrastructure.

OPTION FOUR – SMALL BUSINESS ADVOCATE

The Small Business Advocate would provide independent representation of small business interests and concerns within the Australian Government. The advocate would have the capacity for investigating and advising the Australian Government on small business issues, including dispute resolution. An initial referral service will utilise existing low cost state or territory dispute resolution mechanisms. Where a gap in existing services is identified, a suitable mediation service would be established (incorporating aspects of Option Two).

1. INTRODUCTION

1.1. PURPOSE

The purpose of this paper is to seek stakeholder views on four options for a national dispute resolution service for small business. The paper sets out the options based on existing research as well as the concerns raised by stakeholders.

A key focus of this paper is on exploring affordable and accessible dispute resolution options that have the potential to directly benefit those small businesses that would otherwise not pursue dispute resolution for fear of the cost or being unaware of the appropriate service. Moreover, the intention in canvassing these options is not to overlap or duplicate existing dispute resolution services but to assist, enhance and supplement where necessary.

The options canvassed in this paper are pitched at a high-level for the purpose of eliciting the broadest range of feedback. The options may become more complex when they are examined in greater detail, for example when they are put in the context of state and territory laws and with regard to different types of small business. However, for the purposes of this paper it is important to establish some broad parameters so that the full range of options can be considered in the initial phase of this project.

You may provide feedback on the options in any way you wish. For example, you may have a view on the profile of small businesses that are most in need of affordable and accessible dispute resolution options. You may also have a view on existing dispute resolution services that can be extended to cover more small business activities. Similarly, you may have a view on an existing mechanism you feel is not easily accessed or is not sufficiently affordable for small businesses. We also encourage views on alternative options or a combination of the options outlined in this paper.

1.2. BACKGROUND

From time to time small businesses require affordable and accessible measures to help them resolve their disputes with other businesses. Whilst it is a normal day-to-day business requirement to manage disputes, it can be a significant burden on small business when time and money has to be diverted to resolve disputes using external assistance. The options canvassed in this paper are intended to promote discussion and generate feedback on mechanisms that can improve dispute resolution outcomes for small business. To guarantee that improvement, the best option needs to be easy to access, quick to establish the most appropriate resolution path, and low-cost to the business.

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.

A range of dispute resolution mechanisms exist for small businesses to resolve business-to-business disputes. Some of the most accessible mechanisms in the states and territories are either free, or provided at very low cost. In addition to state and territory legal avenues there are industry ombudsmen, sector specific codes of conduct, industry organisations and private dispute resolution services.

Despite the availability of information on dispute avoidance and dispute management, consultations suggest that small businesses tend to avoid dealing with their disputes until the dispute has reached a toxic stage. When this stage is reached some early intervention dispute management options may no longer be available. The development of small business' management skills may empower them to both avoid disputes arising, and effectively deal with disputes at an early stage.

The following key reasons for small businesses avoidance of dealing with disputes have been raised:

- small businesses often lack the required dispute management skills;
- small businesses lack the resources (time and money) to invest in pursuing the resolution of disputes;
- small businesses do not want to damage valuable relationships with key suppliers, clients or larger business, and fear that dealing with a dispute will do so; and
- small businesses are not aware of the dispute resolution options available to them, particularly those such as assisted negotiation that can be used before the dispute has escalated.

Alternative Dispute Resolution (ADR)

ADR can be described as *'an umbrella term for processes, other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them'*¹. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also mean assisted or appropriate dispute resolution. The main types of ADR are mediation, arbitration and conciliation.

Definitions of common ADR process²

Mediation

A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

Arbitration

A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.

Conciliation

A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

¹ NADRAC (National Alternative Dispute Resolution Advisory Council), *Dispute Resolution Terms*, September, 2003.

² Ibid

ADR can be particularly useful to small businesses in the following ways:

- Clarify areas of disagreement including the rights and the responsibilities of the parties involved in the dispute;
- Often cheaper, quicker and less formal than litigation/judicial processes;
- A sense of ownership in determining the outcome of the dispute; and
- Help to maintain or improve ongoing business relationships.

Dispute resolution through ADR processes is compromised if one or both parties do not approach the ADR process with a genuine desire to resolve the dispute. In these cases the ADR process may only delay formal resolution by a decision maker and increase costs.

Research on small business dispute resolution

To date, there has been very little research conducted regarding 'business-to-business' dispute resolution arrangements for small business, including ADR. In 2007, the Victorian Department of Justice surveyed ADR use by small businesses in that state. This survey was restricted to Victoria and based on a relatively small sample size.

In 2010 the Department of Innovation, Industry, Science and Research conducted a survey of small businesses to better understand the nature of small business (business to business) disputes. The Small Business Dispute Resolution Survey³ focused on disputes between small businesses and other Australian-based businesses. It had a particular focus on discerning the incidence rate of small business disputes, as well as identifying any un-met demand. In summary, the survey found that:

- Approximately 6.5% of small businesses have had a dispute serious enough to warrant further action in the last five years. A further 2.5% identified their dispute as 'serious', but did not take any further action;
- Of the small businesses who indicated that they had experienced a serious disagreement, 65% indicated that it had been a disagreement over payment for goods or services; and 30% indicated that the dispute was over other contractual obligations (excluding payment, retail tenancy and franchising issues).
- Unmet demand (i.e. dissatisfaction with available dispute resolution mechanisms) is approximately 0.9%, which represents approximately 6% of small business who experienced a dispute;
- Small businesses avoid escalating disputes because of the costs (or perceived costs) involved;
- Most serious disputes were regarding a disagreement over payments for goods and services; and
- If small businesses use ADR methods they are more satisfied with the outcomes than going to the courts or seeing a legal practitioner.

The key message taken from this study is that despite the wide range of mechanisms available, including low cost and free services, small businesses are not generally aware of the existing services, the relative costs or suitability of each mechanism for different types of disputes. The survey also found that small businesses have a low awareness of ADR and this view was supported by stakeholders consulted in the development of this paper.

³ <http://www.innovation.gov.au/SmallBusiness/Support/Documents/DisputeResolutionSurveyReport.pdf>.

The capacity of small business in terms of dispute management skills has been raised as an issue in many consultations. Small businesses can face an increased risk of business failure as a consequence of their limited experience in these areas.

The evidence for the options outlined in this paper combine the findings of the Small Business Dispute Resolution Survey, with information that emerged from the initial consultation process with state and territory jurisdictions and small business stakeholders. It is important to note that small business options for dispute resolution services can differ across jurisdictions. This is outlined in 1.3 (below) 'The dispute resolution landscape in Australia', with further details provided at **Appendix 1**.

1.3. THE DISPUTE RESOLUTION LANDSCAPE

There are many channels for dispute resolution⁴. Commenting on the dispute resolution processes available in Victoria, the Victorian Parliament Law Reform Committee states that '*The sheer number of services can be confusing for members of the community, who may become 'lost' in the system*⁵. This can be extended to small business awareness of dispute resolution services where a key finding of the DIISR survey and comments from stakeholders reveal that small businesses do not know what options are available to them to resolve their disputes. This indicates why small business' use of ADR is relatively low.

The following sections aim to briefly describe the many approaches to dispute resolution, including ADR. This is not an exhaustive list of all possible mechanisms available across the public and private sectors, but it gives an indication of the range of mechanisms that currently exist. **Appendix 1** of this paper contains information on a range of small business dispute resolution options provided by governments across Australia.

1.3.1 Education and awareness

Information and advice on dispute management⁶ for small business is available from a range of sources including industry associations, business enterprise centres, business consultants and government agencies. Most sources provide some information on dispute avoidance and management and a reference(s) to one or more dispute resolution services. However, if the small businesses have little knowledge about resolving disputes it is challenging navigating through the many and different services available. What is lacking is an explanation of the different ways to manage a dispute, their relative cost, and which service is most useful in particular circumstances.

1.3.2 Public dispute resolution services

In addition to courts and tribunals (covered later), various government agencies and statutory bodies provide dispute resolution services in each state and territory.

Community justice centres

Community justice centres were established to relieve pressure on the court system and to provide an inexpensive and accessible means to resolve disputes for the community. Fully

⁴ Dispute resolution refers to all processes that are used to resolve disputes, whether within or outside court proceedings. Dispute resolution processes may be facilitative, advisory or determinative – *NADRAC Glossary of ADR Terms*, www.nadrac.gov.au.

⁵ Victorian Parliament Law Reform Committee, *Inquiry into alternative dispute resolution and restorative justice*, May 2009, p. xlv

⁶ Dispute management is a broad term describing processes and principles to deal with complaints in a quick, fair, sensible manner.

government funded centres exist in NSW, Victoria, Queensland and the Northern Territory and provide free mediation services. Partially subsidised centres also exist in the ACT and Western Australia.

Although such centres were established primarily to deal with neighbourhood disputes, they are able to mediate small business (business-to-business) disputes if both parties are willing to participate. It appears that, despite the low cost, few small businesses approach community justice centres with their disputes which may be due to the low awareness of these services for small businesses.

The more common interaction of small business with these centres is via referral for mediation from a court or tribunal e.g. the Queensland Civil and Administrative Tribunal (QCAT) refer parties to the Dispute Resolution Centre, and the Magistrate's Court of Victoria to the Dispute Settlement Centre Victoria.

Victorian Small Business Commissioner (VSBC)

The Victorian Small Business Commissioner (VSBC) is a dedicated low cost dispute resolution service targeted at resolving small business disputes. Under the *Small Business Commissioner Act 2003* (Victoria), the VSBC is able to receive and investigate complaints made by small business regarding unfair market practices. The VSBC may mediate between the parties involved as well as make representations to an appropriate person or body on behalf of the small business that has made the complaint. The VSBC also undertakes compulsory mediations referred from the Victorian Civil and Administrative Tribunal. Models based on the VSBC are also in the process of being implemented in South Australia, Western Australia and New South Wales.

The VSBC provides early assistance in disputes. This includes ensuring that parties understand their rights and responsibilities in relation to the issue that gave rise to the dispute as well as to help write to the organisation against which the small business has made a complaint. Approximately 30% of cases are resolved during this investigation stage.⁷ If the dispute is not resolved in the investigation process, the parties proceed to mediation, which costs \$195 per party and is generally around 3-4 hours duration. The success rate of mediation is over 80%. The number of disputes referred to the VSBC in 2008-09 was 1,362; an increase of 16% over the previous year.⁸ The VSBC attributes this in part to the steady increase in awareness of the VSBC since it was established in 2003.

Small business rights under national legislation

Small businesses have common law and statutory rights that they can rely on in business transactions and can enforce in federal courts or state and territory courts and tribunals.

Of particular relevance to small businesses is the *Competition and Consumer Act 2010* (CCA), which incorporates the Australian Consumer Law (ACL).⁹ The aim of the CCA is to promote a competitive and fair business environment. In many cases, the protections provided by the ACL apply to all individuals and businesses (including small businesses), rather than being restricted to 'consumers' as defined, where the relevant conduct is in trade or commerce.

⁷ Office of the Victorian Small Business Commissioner, *Annual Report 2008-09*.

⁸ *Ibid.*

⁹ The CCA was known as the *Trade Practices Act 1974* until 1 January 2011.

Actions against breaches of the ACL can also be taken by national and state and territory agencies, including the Australian Competition and Consumer Commission and each state or territory's consumer and fair trading agencies.

General protections under the ACL for individuals and businesses include broad prohibitions against misleading or deceptive conduct and unconscionable conduct. Specific forms of unfair practices that are prohibited under the ACL include certain false or misleading representations, the supply of unsolicited goods or services, participating in pyramid schemes, and practices involving the display of prices, referral selling, harassment or coercion. Where certain criteria are met, the ACL also provides protections for businesses through guaranteed rights for goods and services and introduces national rules for unsolicited sales transactions.

The ACL is designed to be enforced by those who may be affected by conduct in breach of its protections. This means that individuals or businesses who suffer loss or damage as a result of conduct in breach of the ACL may take action to protect their rights. This could include situations where a small business is directly harmed by another business's conduct (for example, through unconscionable conduct) or where a business suffers as a result of a competing business engaging in conduct which is designed to damage its competitors (for example, making false or misleading claims in advertising).

When an individual or business takes action to protect their rights under the ACL they can seek civil remedies, including injunctions, damages and compensatory orders. These remedies are also available in relation to breaches of the requirements of mandatory industry codes of conduct, including the Franchising Code of Conduct, the Horticulture Code of Conduct and the Oilcode.

Australian Competition and Consumer Commission (ACCC)

Small businesses can contact the ACCC to seek information and make complaints on matters relating to the CCA and the ACL. Of particular relevance to small business (business-to-business) disputes, the ACCC:

- promotes compliance, may refer clients to appropriate services or take enforcement action on non-compliance with the mandatory codes of conduct including the Franchising Code of Conduct, the Oilcode, and the Horticulture Code of Conduct;
- may take action against a business that has engaged in unconscionable, misleading or deceptive conduct, or unfair practices, including false or misleading representations, wrongly accepting payment for goods and services, and harassment and coercion; and
- may take action on a competition issue, such as third line forcing, boycotts, resale price maintenance and limitations on resellers, by talking to the supplier, accepting enforceable undertakings or by instituting proceedings in the Federal Court.

Small businesses have a relatively high awareness of the ACCC and the potential help for their issues. As a result the ACCC receive complaints that do not relate directly to the CCA.

State fair trading and consumer affairs agencies

Fair trading and consumer affairs agencies provide advice and may undertake investigations into unfair practice issues on the behalf of consumers, as they also enforce the ACL in their own jurisdictions. While these agencies may not deal with many small business disputes, it is the case that small businesses have a high recognition of the services provided to consumer

through these agencies¹⁰, and do not always identify their disputes as a business dispute¹¹, potentially allowing resolution of some disputes through this channel. Additionally, in NSW, South Australia, Tasmania and the Northern Territory, fair trading and consumer affairs agencies manage retail tenancy legislation and may provide mediation for retail tenancy disputes.

1.3.3 Private practitioners and dispute resolution firms

The most common third parties whom small businesses employ to assist in the resolution of disputes are legal practitioners. Small businesses may approach legal practitioners for advice, assistance in recovering debts, and for representation in court or other dispute resolution processes. Small businesses may also employ the services of collection agencies to secure payment of monies owed. While this option has associated costs, it is more accessible and could be tailored to the needs of small business. Having a third party dealing exclusively with a dispute allows small businesses to remain focussed on the core activities of their business.

Arguably, supporting such services can assist to preserve the integrity of both the courts as an adjudicative forum and of ADR as an alternative forum for private and consensual resolution of disputes.'

ADR practitioners

Small businesses may also engage private ADR practitioners, who can provide conciliation, mediation, arbitration and facilitation services. The cost for private ADR practitioners varies: daily rates for practitioners tend to be in the range of \$2,000 – \$5,000, and the dispute resolution process can extend over several days. At the highest end of the scale, daily rates can be up to \$15,000 and are usually charged by senior members of the bar or retired judges¹², often for advisory and arbitral forms of dispute resolution.

Service contracts between small businesses and larger firms are increasingly incorporating a dispute resolution clause that specifies the type and/or provider of ADR that must be utilised in the case of a dispute. In many instances, small business benefit from the guidance provided on dispute resolution. However, the nominated dispute resolution processes and/or providers may be too costly or inappropriate for a particular dispute.

There are several private sector organisations whose members provide ADR services. These include the Institute of Arbitrators and Mediators Australia (IAMA), the Australian Mediation Association (AMA), the Australian Dispute Resolution Association (ADRA), the Australian Commercial Disputes Centre (ACDC), Legal Practitioners Engaged in ADR (LEADR) and state based ADR membership organisations. These organisations can arrange referral of the case to one of its members, often for a fee. Membership organisations also generally provide member support and ADR accreditation, as well as general promotion of ADR. Many bar associations and law societies also have registers of mediator and arbitrator members to whom they can refer small businesses.

Dispute resolution services can also be provided by specialist ADR firms. These businesses range from providing a single service e.g. mediation only, to larger dispute resolution firms providing a range of ADR services. Larger firms generally assess the nature of the dispute

¹⁰ Department of Justice (Victoria), *Dispute resolution in Victoria: Small business survey*, 2007.

¹¹ Financial Ombudsman Service (UK), *Annual Review 2008-09*, p.24.

¹² National Alternative Dispute Resolution Advisory Council (NADRAC), *The resolve to resolve — embracing ADR to improve access to justice in the federal jurisdiction*, 2009, 65.

before advising a particular resolution method. Some private firms specialise in small business disputes, while others specialise in resolving disputes on a set of particular issues.

1.3.4 Industry schemes

Industry ombudsmen and industry codes of conduct

Industry ombudsmen are established by specific industries to provide a cost effective and quick means of resolving complaints within an industry. Industry ombudsmen, also known as external dispute resolution or enterprise dispute resolution (EDR) schemes, tend to have a high level of acceptance of current EDR schemes by the relevant industry and high levels of perceived fairness and user satisfaction. Funding for dispute resolution under these industry codes is either provided by industry scheme members or through government support. Industry members may be required by law to be part of an approved industry ombudsmen scheme.

In most EDR schemes, the dispute resolution process requires the consumer to first attempt to resolve the dispute directly with the scheme member. If this fails, the industry ombudsman will conduct an investigation into the dispute, and subsequently conduct conciliation or mediation. A large proportion of disputes are resolved during the investigation stage. The industry ombudsman can make a determination if ADR has not resulted in the resolution of an issue (when the amount in dispute is below a certain threshold). Decisions by industry ombudsmen are generally not binding on the consumer, but are binding on the scheme member.

Although many industry codes of conduct were established to address an imbalance of power between consumers and providers with individual consumers in mind, small business are generally eligible to make complaints to industry ombudsmen. Codes of conduct of particular relevance to small businesses, legislated under the CCA, are the Franchising Code of Conduct, Horticulture Code of Conduct and Oilcode. These codes were established to regulate conduct between small and larger businesses and provide dispute resolution schemes in those industries.

Industry ombudsmen schemes and codes of conduct relevant to small business business-to-business disputes include:

- the Financial Ombudsman Service;
- the Telecommunications Industry Ombudsman;
- Energy ombudsmen in each state;
- Franchising code of conduct;
- Horticulture Code of conduct;
- Oilcode;
- Motor Vehicle and Insurance Industry Code of Conduct;
- Australian Wine Industry Code of Conduct;
- Produce and Grocery Industry Code of Conduct; and
- Film Exhibition and Distribution Code of Conduct.

1.3.5 Courts and tribunals

Low value disputes can be initiated in state and territory, local or magistrates courts and tribunals, including through small claims processes. Generally, courts and tribunals in Australia refer appropriate cases to some form of ADR process before they proceed. This

helps to resolve issues quickly and to reduce the burden of full hearings on the legal system. In many of the minor claims processes, ADR is free.

A range of courts and tribunals have jurisdiction to adjudicate the array of disputes experienced by small business, and the ACL is designed to be enforceable by both federal courts and in state and territory courts and tribunals as it is simultaneously a law of the Commonwealth and of each State and Territory. Whilst the same general structure is found in all jurisdictions, differences of detail exist. Tribunals, along with lower cost Magistrates courts, appear to be the formal dispute resolution bodies most suited to hearing small business disputes.

Tribunals facilitate informal and relatively quick proceedings that are appropriate for parties with specific or smaller disputes. The rules of evidence do not necessarily apply in tribunals. 'Super' tribunals with wide jurisdictions operate in NSW, Victoria, Queensland, Western Australia and the ACT. The super tribunal structure may make it easier for small business to know where to take their dispute. Directions hearings and case management schemes within tribunals and courts can assist small businesses by clarifying the issues in dispute, referring the case to the most appropriate division of the tribunal or to another dispute resolution body, and by raising awareness of potential legal problems involved in the case at an early stage.

Application costs for tribunals and magistrate's courts are generally relatively low. Every court and tribunal in Australia can direct cases to an ADR process¹³, which can include pre-trial conferences, mediation, arbitration, expert appraisal and settlement negotiations. The type of dispute resolution process adopted will depend on the nature of the dispute and particular division of court or tribunal. In some courts, if a resolution is reached using ADR, the parties may request that the court formalise the agreement in court orders.

1.3.6 International experience

Internationally, different jurisdictions have recognised the importance of assistance in resolving small business disputes. Approaches around the world vary, and range from the simple provision of information on dispute resolution, to more formal tribunal mechanisms. These approaches often operate concurrently with traditional court mechanisms. In many jurisdictions, disputing parties have a range of options available to them to settle their disputes.

Approaches in Hong Kong, the United Kingdom, New Zealand and the United States of America are discussed where they relate to the options proposed.

¹³ Sourdin, T. *Alternative Dispute Resolution* 3rd Ed., Thomson Reuters. 2008

2. OPTIONS FOR NATIONAL DISPUTE RESOLUTION SERVICES FOR SMALL BUSINESS

2.1. OPTION 1 – NATIONAL INFORMATION AND REFERRAL SERVICE

2.1.1 Overview/desired outcome

National Information and Referral service	
Issue	<ul style="list-style-type: none"> • Many and varying dispute resolution services offered by state, territory and Australian governments. • Generally, small business has a low awareness of: • How to avoid commercial disputes; • How to effectively deal with a commercial dispute; and • The most appropriate dispute resolution service for a particular dispute.
Option 1	Establish a dedicated national small business referral service that provides information and guidance on dispute resolution.
Intended outcome	A centralised information resource for small businesses that provides practical guidance and refers relevant cases onto a dispute resolution service. This option is supported by a broad education scheme aimed at improving small business' awareness of which service will assist their disputes.

2.1.2 Option description

The National Information and Referral Service would provide a national, central referral service to direct small businesses to relevant dispute resolution services. This option would provide information and guidance on how to avoid and deal with business to business disputes. The option would also provide services that are available for small business to help resolve their disputes. Rather than creating a new entity or duplicating services, this option would bring together existing government services and would include the following elements:

1. Dedicated website and phone line

A national information source that is easily accessible for small businesses using a dedicated website, email service and phone line. To address the challenges that small businesses have with finding practical and relevant information quickly and easily this service could be integrated into existing services such as the Small Business Support Line and Advisor Finder on *business.gov.au*.

2. Information and advice service

This function would provide practical and relevant information and guidance so that small businesses are better equipped to avoid and deal with their 'business to business' disputes. The aim of this guidance is to enable small business to make better decisions in the conduct

of their business. The information and guidance would be free, confidential and independent. This function could be strengthened by social media that could offer small businesses a forum to share their experiences and pass on practical advice.

3. Referral service

This function would provide information to small business about which organisations and services that may assist in resolving their disputes. Operators would refer callers to existing services after careful consideration and over the phone to ensure that time and effort of the small business is not wasted. The intention of the National Information and Referral service is to put any Australian small business in contact with the relevant existing service quickly.

4. Awareness program

To improve knowledge of dispute resolution services available to small business an awareness program is part of this option. Using avenues such as the dedicated website and information brochures, this program would provide general information so that small businesses know where to go for help to resolve a dispute.

2.1.3 Discussion

There are many different dispute resolution services available across Australia (refer **Appendix 1**). State and territory governments have different approaches to supplying dispute resolution services for small businesses. This depends on many factors, including the type of small business within a jurisdiction, level of subsidy provided and degree of support from legislation and governments.

Raising awareness

The majority of dispute resolution services offered by state and territory governments provide general and specific guidance on resolving disputes, such as strategies to avoid or deal more appropriately with disputes. These services provide small businesses information on forming and maintaining ongoing productive business relationships. However, there are varying levels of awareness of these services depending on how successful, prominent and length of time the service has been available. It is therefore difficult for the majority of small businesses to be aware of the differing dispute resolution services relevant for their dispute.

Low awareness of dispute resolution options is a significant impediment to small business using dispute resolution services. An education campaign would benefit the sector by informing small business of the services available. This option is specifically aimed at raising awareness of existing dispute resolution services and could use: a dedicated web site; information brochures; and TV, radio and print advertisements.

General Information and guidance

Resolving disputes quickly is important when operating a small business. A national information service that promptly provides the information of the relevant dispute resolution service would enable small businesses to more effectively deal with their disputes. A dedicated website, email service and phone line would make the information easily accessible.

Furthermore, many small businesses are unaware how dispute resolution can assist in maintaining business relationships. Small businesses will benefit from general practical guidance on disputes so that they better understand their situation, the options available to them and how best to resolve their dispute. An important part of being able to resolve disputes is not only having the services available but also having the business skills to avoid or 'work through' issues.

Providing general guidance is aimed at giving small businesses the capacity to make better decisions to maintain productive, ongoing business relationships. The information and advice could include:

- Strategies to avoid disputes;
- Strategies to deal with a disputes;
- Small business rights and responsibilities;
- What dispute resolution is and what dispute resolution can and cannot provide;
- How alternative dispute resolution will help resolve issues;
- The role of courts and tribunals, and
- What to expect during the various dispute resolution processes.

Some existing services already provide advice relevant for specific jurisdictions. This option aims to avoid duplication. The focus of this option would be on providing timely and useful general guidance and would not constitute advice on specific technical or legal issues. This option has no investigative capacity. Any guidance provided, or the decision to refer, would be based on a considered assessment of the small business dispute.

To improve the feasibility and accessibility of this option, existing infrastructure or services, such as websites or support lines, could be expanded. For example the information website could be built into *business.gov.au*, which already receives more than 2 million hits a year.

Referral service

Some disputes may be resolved after providing basic information or guidance. However where a case cannot be easily solved after general guidance and would benefit from a dispute resolution service, then the dispute will be referred onto the relevant service. There are multiple existing dispute resolution services in each state and territory. This option would ensure that small businesses benefit from these services.

Referral will depend on whether a dispute resolution option exists for a particular dispute. There may be instances where a service is unavailable or the small business may not be eligible. This option is a referral service only and it would not have any investigative or legal role. Consideration needs to be given to whether this referral service will provide sufficient benefits for small business.

Whilst the focus of this option is to support access to low cost alternative dispute resolution, other avenues for dispute resolution do exist (refer to **appendix 1**). The information and referral service would identify when the most appropriate option for a small business is to seek remedies in the court system.

Avoiding duplication

Drawing together the many dispute resolution services that are already available is key to avoiding duplication in the development of a national service. A close collaborative relationship with service providers around Australia is fundamental to the success of this option.

This option seeks a 'light touch' approach, using existing infrastructure to service the majority of small business dispute issues. Where there is no existing service in a particular area, the referral service would not assist all these small businesses. The National Information and Referral Service option is the most achievable of those presented in this paper, and could be implemented more quickly and economically than the others.

International comparison: Hong Kong

In 2010 the Hong Kong Judiciary established the Mediation Information Office, which assists the public to understand the nature of mediation and how it will help parties to resolve their disputes. The Mediation Information Office directs parties seeking mediation to professional bodies, and also runs information sessions on mediation. The Hong Kong Judiciary has also established a mediation website, which provides information on mediation and mediation providers in Hong Kong.

Focus questions

- Would the service establish a new phone line or website or should it use an existing service that many small businesses are already aware of?
- What types of general information and guidance would be most useful to small business in their business disputes?
- Would a national referral service be used by small businesses? If so, how valuable would it be?
- What are the best ways to reach small businesses to improve awareness of dispute resolution?

2.2. OPTION 2 – NATIONAL DISPUTE RESOLUTION SERVICE

2.2.1 Overview/desired outcome

National Dispute Resolution Service	
Issue	<ul style="list-style-type: none"> • Many and varying dispute resolution services offered by state, territory and Australian governments. • Australian government may have a role to address identifiable gaps in dispute resolution services for small businesses. • Generally, small business has a low awareness of: <ul style="list-style-type: none"> • How to avoid commercial disputes; • How to effectively deal with a commercial dispute; and • The most appropriate dispute resolution service for a particular dispute.
Option 2	Establish a national small business dispute resolution referral service that provides information and guidance on dispute resolution. Where there is a service gap for small businesses the Australian government will establish a mediation service.
Intended outcome	A centralised information resource for small business providing basic business guidance for business-to-business disputes. A referral service will ensure that dispute resolution needs for small business are addressed. Where there is an identifiable gap in existing services, establish a mediation service. This option is supported by an outreach education scheme to improve the small business awareness of how to best avoid, manage and resolve disputes.

2.2.2 Option description

The National Dispute Resolution Service, seeks to provide a national, centralised dispute resolution information resource for small business. This option will provide information and guidance on how to avoid and deal with business to business disputes for small businesses. This option intends to pull together pre-existing government services but would also establish a mediation service where there is an identifiable service gap for small businesses.

Options one and two are the same for the following functions:

1. **Dedicated website and phone line**
2. **Information and guidance service**
3. **Referral service**

This option has two additional key features that aim to better serve small businesses.

4. Mediation service

There may be instances where an appropriate service is not available, or the small business may not be eligible. Where there are identifiable and significant gaps in dispute resolution services for small businesses, there may be a case for the Commonwealth Government to establish a mediation service using a panel of accredited mediators¹⁴. This service could be subsidised to encourage usage by small businesses. These services would be used where no similar state or territory mechanism exists, or if the dispute is across jurisdictions and has no obvious forum for resolution.

5. Awareness campaign

To improve decision making skills and the knowledge of dispute resolution services of small business, this option would provide for an awareness campaign. The awareness campaign would advertise the national service and provide practical information about dispute resolution. This campaign would actively engage with small businesses that were vulnerable to disputes or prone to adverse outcomes in their disputes. The campaign could take a variety of forms, including websites, social media, advertisements on television and radio, in trade magazines, and at conferences and travelling road shows.

The awareness campaign of this option is more active and targeted to vulnerable small businesses than the general awareness raising program of option one (National Information and Referral Service).

2.2.3 Discussion

Critical in resolving small businesses disputes is having a mechanism that is quick and low cost. An easily accessible information and advice source would enable small businesses to more effectively deal with their disputes. A dedicated website, email service and phone line would make the information easily accessible.

Mediation service

The Australian Government would need to establish whether there is an identifiable and significant need for another dispute resolution service. There may be service gaps in some regions, possibly because there is not a great demand for dispute resolution services. More research is required to determine the need for the mediation services.

A Commonwealth provided, low cost service would focus on early intervention to maximise the benefits for small businesses by allowing parties to attempt to resolve their dispute prior to more formal and costly means. Where mediation is appropriate, the parties would be referred to a mediator from a panel of accredited mediators¹⁵ maintained by the Government. Clear guidelines regarding access to this service would need to be established.

Mediation is the most flexible form of dispute resolution and the most appropriate service for the Australian Government to provide. Mediation can be utilised to resolve a wide range of disputes. Mediation is usually considered to be a process in which the participants, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator is usually regarded as having a facilitative role and will not provide advice on the matters in dispute. The mediator may have

¹⁴ Accredited under the National Mediation Accreditation System – www.msb.org.au

¹⁵ Ibid.

no particular experience or expertise in the subject area of the dispute but would be expected to be experienced and have expertise in the mediation process itself.

Awareness campaign

This option is specifically aimed at raising awareness of those small businesses most in need of dispute resolution options and skills. As with any education campaign to small businesses who are typically challenging to engage, it is important to understand and utilise the best modes of communication to effectively connect to small business. The awareness campaign may be conducted in partnership with relevant government agencies, private service providers and industry associations to better engage with small business and meet their dispute resolution needs.

This option would avoid duplication of existing services and would bring together existing dispute resolution services for small business. The implementation of this option may require formal agreement between governments across Australia.

The National Dispute Resolution Service is more active than option one. This option provides for a mediation service that would serve areas not covered by existing schemes. This option would raise awareness of dispute resolution strategies and dispute resolution services for small businesses and may present the most value for small business in Australia.

International comparison: The United Kingdom

Her Majesty's Court Service and the Civil Mediation Council support the National Mediation Helpline, which aims "to provide members of the public with a simple, low cost method of resolving a wide range of civil disputes."¹⁶ National Mediation Helpline operators explain the principles of mediation, and answer general questions about mediation. Operators can put parties in contact with a mediation organisation, which then assigns a local, professional mediator to the matter if required.

Fees for the mediation service are linked to the amount of money claimed. The lowest fee is £50 + Value Added Tax (approximately AUD\$80), payable by each party for one hour of mediation. Since its establishment in 2004, the National Mediation Hotline has achieved an average settlement rate of 66%.¹⁷ The National Mediation Hotline is operated on behalf of the Ministry of Justice by a private provider.

Focus questions

- Are there any significant areas of small business that are not covered by current dispute resolution services? If so, does the Commonwealth Government have a role in addressing this service gap?
- Would the government be better served in raising awareness of what's available or how to avoid and/or deal with a business-to-business dispute?
- Can it be achieved using a Memorandum of Understanding (MOU) or an Inter-Governmental Agreement (IGA)?

¹⁶ <http://www.nationalmediationhelpline.com/frequently-asked-questions.php>

¹⁷ Ibid.

2.3. OPTION 3 – NATIONAL SMALL BUSINESS TRIBUNAL

2.3.1 Overview/desired outcome

National Small Business Tribunal	
Issue	<ul style="list-style-type: none"> • Differing approaches to small business dispute resolution across state, territory and Commonwealth jurisdictions. • Lack of knowledge about where to seek assistance for small business dispute resolution services. • Myriad of small business dispute resolution services across jurisdictions and no “one stop shop”.
Option 3	Create a National Small Business Tribunal, which will deal exclusively with small business disputes, offering conciliation and reviews of conciliation outcomes. The Tribunal will be backed by Commonwealth legislation.
Intended outcome	The National Small Business Tribunal will be the first contact point for small businesses with disputes. It will aim to solve disputes in a fair, economic, informal and expedient manner, with the majority of disputes being settled by conciliation.

2.3.2 Option description

The National Small Business Tribunal (NSBT) option would provide a national dispute resolution service for small business which is fair, economical, informal and expedient. The NSBT will exist purely as an independent dispute resolution body.

The NSBT would serve as the national point of contact for small businesses in dispute. This would address the information gap of small businesses being unaware of dispute resolution mechanisms. The NSBT would have the powers of investigation, conciliation and review, which would be backed by new Commonwealth legislation. New legal infrastructure would be required to establish the NSBT, including the introduction of legislation, and the establishment of a new Commonwealth legal entity. The legislation would create the NSBT and define its role and functions.

The NSBT would be based in a capital city, with the majority of its conciliation work being carried out by telephone. The NSBT may be able to access existing federal court infrastructure. In the future, it may also be possible to undertake conciliation through the Australian Government’s dedicated business web portal, www.business.gov.au. Online dispute resolution is “an important addition to the existing ADR field and a valuable mechanism to overcome many barriers that exist in relation to the use of ADR.”¹⁸

To encourage utilisation of the NSBT, and recognising that cost is often a factor for small business in deciding to commence dispute resolution processes, the costs of conciliation would be subsidised by the Commonwealth.

¹⁸ NADRAC, op. cit. 72.

The NSBT would be promoted as the national service for small business disputes, and if the NSBT is not the appropriate forum for the dispute, the NSBT could refer small businesses to other jurisdictions as required.

The NSBT would follow the process described below to resolve small business disputes:

1. Application

Applicants to the NSBT would complete an online form which would formally commence proceedings. Prior to their application, applicants would be required to have already made genuine efforts to resolve their dispute (such as sending a letter of demand). Application costs would be minimal and paid for by the applicant.

2. Investigation

The NSBT would investigate disputes prior to determining the need for conciliation, “investigation” could be as simple as discussing the dispute with each party to assess the facts of the case. Experience in other jurisdictions suggests that early official intervention at this stage may result in a significant number of matters being withdrawn or settled independently. There will be no cost to either party at the investigation stage.

3. Conciliation

Once the NSBT has investigated the dispute, if necessary, it would offer conciliation between the parties, depending on the parties and their needs. Conciliation is considered to be a process in which the parties to a dispute, with the assistance of a third person (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has an advisory role, but not a determinative one. The conciliator may be legally qualified or has experience with, or professional or technical qualifications in, the subject area of the dispute that they are conciliating. The conciliator may suggest and/or give expert advice on possible options for resolving the issues in dispute and may actively encourage the participants to reach an agreement. The conciliator would be responsible for managing the dispute resolution process, including setting the ground rules, managing any apparent power imbalances between the participants and ensuring the participants conduct themselves appropriately.¹⁹

It is envisaged that most disputes will be resolved at the conciliation stage. The desired outcome will be full settlement of the dispute.

The cost of the conciliation session would be borne by both parties and the Commonwealth, taking account of cost structures for similar existing services offered in other jurisdictions.

4. Review of Dispute

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.

¹⁹ NADRAC – *What is ADR?* – http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADRConciliation

2.3.3 Discussion

The Tribunal Model

The aim of the NSBT is to provide a national small business dispute resolution body. The NSBT option aims to address the perceived need for an expedient dispute resolution system which can also result in a decision that is binding on the parties if required.

The proposed conciliation services would provide small businesses a low cost mechanism that is efficient and tailored to small business needs. It is envisaged that the majority of disputes would be solved during conciliation, which would result in both parties being more satisfied with the outcome.

When conciliation is unsuccessful, cases could be referred to a NSBT member for review of the dispute. Once a matter goes to the NSBT member for review the decision would be binding on the parties, and the parties would agree to be bound by this decision.

Potential judgement and enforcement powers would need further clarification. Further discussion of the operation of the NSBT would also be required, particularly concerning the legislative background for the NSBT.

The NSBT would not provide education and information services for small businesses, other than to raise awareness about the NSBT services. The NSBT would not have any small business advocacy role. This would ensure the NSBT's independent status is not compromised, and give the NSBT credibility in the eyes of the wider community.

Jurisdiction

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 hear.

A clearly defined charter would ensure that the NSBT may only deal with those matters which can be dealt with in an economic, informal and expedient manner. This would also prevent 'forum shopping'.

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.

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.

Legal Issues

The establishment of the NSBT would require extensive negotiation and consultation across different levels of government, the development of legislation and adherence to parliamentary processes. Constitutional questions relating to the judicial power of the Commonwealth would need to be addressed and the charter of the NSBT would need to be clearly defined. The time required to establish the NSBT is likely to be lengthy.

Conclusion

The scope of the NSBT option is large and the establishment of the NSBT would require a significant amount of time and resources. Initial consultations have suggested that the NSBT option would be difficult to implement, particularly because of the jurisdictional and legal issues it raises. The NSBT would improve dispute resolution for small businesses in states and territories where no low cost mechanisms exist, however the NSBT may potentially duplicate existing services in some states. Duplication would need to be suitably dealt with between governments to help avoid confusion amongst stakeholders.

An important feature of the NSBT model is that it would be low cost for small business but at this stage it is unknown how many businesses would use this type of option.

The cost of the NSBT is unclear at this stage, although it is likely to be the most expensive of the proposed options in this paper.

International comparison: New Zealand

The New Zealand Disputes Tribunal aims to provide parties with “a quick, inexpensive, informal and private way to help resolve a wide range of civil disputes”.²⁰ The Tribunal makes binding decisions on matters where the claim is less than NZ\$15,000 (approximately AUD\$11,000).

There are no judges or lawyers involved in the tribunal process, and decisions in matters are made by a referee. Lawyers can not attend a hearing, and application fees are low. The Disputes Tribunal has fifteen offices around New Zealand.

Focus questions

- How will the NSBT define eligible “small business”?
- Which Commonwealth agency is best placed to establish and administer the NSBT?
- Is this option the most cost effective way of addressing small business dispute resolution?
- Who will be tribunal members and how will they be recruited?
- How far will this option go to fill existing gaps in small business dispute resolution?
- Does the NSBT duplicate existing services? How could the duplication of existing services be avoided?
- Does this option overestimate the demand for small business dispute resolution services?

²⁰ New Zealand Disputes Tribunal – <http://www.justice.govt.nz/tribunals/disputes-tribunal>

2.4. OPTION 4 – SMALL BUSINESS ADVOCATE

2.4.1 Overview/desired outcome

Small Business Advocate	
Issue	<ul style="list-style-type: none"> • Differing approaches to small business dispute resolution across state, territory and Commonwealth jurisdictions. • Concerns that small business issues are not adequately represented within government departments at the national level.
Option 4	Establish a Commonwealth Small Business Advocate which incorporates a dispute resolution function for education, early intervention and mediation for small business (business-to-business) disputes.
Intended outcome	<p>A National Small Business Advocate approach will allow independent representation of small business interests and concerns at the national level. It will assist in alleviating cross jurisdictional issues with the capacity for investigating and making recommendations based on on-going analysis of small business issues, including access to dispute resolution mechanisms.</p> <p>The approach to small business disputes can be more actively focused on prevention and would provide a dispute resolution service where no low cost alternative exists.</p>

2.4.2 Option description

The Small Business Advocate would be an independent voice for small business within the Australian Government—reporting directly to the Minister for Small Business. Ideally it will have the capacity for investigating and making recommendations based on on-going analysis of small business issues.

The Advocate's role could be set-out within a terms of reference. An inter-governmental agreement (IGA) or memorandum of understanding (MOU) would be established with state and territory jurisdictions to allow for a collaborative approach and for cross-jurisdictional issues to be resolved and could link-in with similar offices, such as state Small Business Commissioners.

The Advocate would be supported by the Office of Small Business Advocacy (OSBA), to undertake the following functions:

1. Independent advice and recommendations to the Government

The Advocate could provide independent advice and recommendations to the Australian Government. The Advocate may investigate small business complaints; review and provide comment on systemic issues and make submissions to relevant inquiries.

2. Dispute resolution/management

The OSBA could provide a referral service for disputes between small businesses and other businesses. The focus would be on referring small businesses to existing low cost mediation and dispute resolution mechanisms. The Advocate would also maintain a panel of accredited mediators to provide for early intervention and mediation where no similar state or territory mechanism exists or for cross-jurisdictional disputes. A MOU or similar would be established with the relevant state and territory body to set the parameters when defining cross-jurisdictional disputes. This would not remove the right of either party to pursue other dispute resolution remedies if the dispute is unable to be resolved. This incorporates the aspects proposed in option two of this paper.

The Advocate's mandate may include policy capacity for investigating and making recommendations based on on-going analysis of small business disputes (outlined further below). The OSBA may also work with state and territory jurisdictions (i.e. state Small Business Commissioners or applicable agency) on a national approach to resolving small business disputes.

3. Education and support

The Advocate (through the OSBA) would provide education services to small business which would include information about the operations of the Advocate, available dispute resolution mechanisms and educating small business on common problem areas that may lead to disputes. The Advocate may provide information and education to improve the capacity of small businesses to manage their own affairs so that disputes are less likely to occur.

The Advocate and OSBA could take responsibility for informing and educating government agencies on the operations of small business. They would work with other agencies and relevant industries to ensure that any education and support services for small business are adequate and suitable for the intended task.

2.4.3 Discussion

While not specifically replicating any existing models or structures, certain aspects of a number of services, both nationally and internationally, have been drawn on to develop this proposed option. These include the various state Small Business Commissioner models, the Office of Advocacy in the United States Small Business Administration, various industry Ombudsmen and aspects of the Office of the Chief Scientist. In particular the role they play in education and awareness for the small business sector.

The Advocate would not involve the exercise of any 'coercive functions' or duplicate activities undertaken at the state and territory level, but will provide a service for dispute resolution where no low cost alternative exists. The type of services offered varies across the country due to the volume of disputes and businesses operating in each state (refer **Appendix 1**). These 'gaps' would need to be identified and clearly defined parameters for this function established.

Advocate versus Ombudsman

Some within the small business sector have suggested that a Small Business Ombudsman is what is required to help resolve disputes and advance the interests of the sector.

In Australia today, there are several types of Ombudsman offices including:

- Parliamentary Ombudsmen who take complaints from citizens and constituents about government agencies;

- Other statutory Ombudsmen/Commissioners who investigate complaints about particular agencies or professional services—such as health; and
- Industry-based Ombudsmen who take complaints from customers of companies providing particular services—such as telecommunications, banking, insurance, investments, energy, water and public transport²¹.

In a presentation to The Australia and New Zealand Ombudsman Association (ANZOA) in April 2008, former Commonwealth Ombudsman Professor John McMillan expressed his concern at the misuse of the term ‘Ombudsman’. He reiterated a recommendation from a major report on the Australian justice system in 1994 by the Access to Justice Advisory Committee, which stated:

“This term has come to be associated with accessible, independent and impartial review. If the word is used to describe systems that do not meet these basic criteria, there is a danger that the term will lose credibility. If used loosely, the term ‘ombudsman’ could mislead the public, rather than protect them.”²²

There appears to be some confusion as to the role of a potential Ombudsman within the small business community. Two of the key principles for defining an Ombudsman are independence and impartiality. In essence, this means that a Small Business Ombudsman can not be a champion of small business or an advocate for business issues. ANZOA has issued Guidelines on the use of the term “Ombudsman” and it is clear that the word “Ombudsman” is not appropriate for what is envisaged here.

The responsibility for complaints regarding government bodies would remain with the Commonwealth Ombudsman.

What’s in a name?

A small number of those consulted during this process expressed some apprehension with using the title ‘Small Business Advocate’ for this role. It was thought that this could potentially lead to a misinterpretation of the proposed role of the Advocate as being the ‘mouth-piece’ for all small business grievances. Establishing clearly defined parameters for the role and functions of the Advocate would assist in alleviating these types of concerns.

While Small Business Advocate is proposed as the title for this role, it could just as easily be called a Small Business Commissioner or similar. Advocate was proposed largely to avoid it being confused with existing or planned Small Business Commissioner models throughout Australia.

What is clear from initial consultations with small business representatives is that no matter what form or name it is given, they simply want a model that is effective, efficient and promotes a level playing field for small business.

More than dispute resolution

While the resolution of small business disputes will be a key policy function of the Advocate, the model proposed provides for an opportunity to expand its role to include other functions to benefit small business.

²¹ Australia and New Zealand Ombudsman Association, *Essential criteria for describing a body as an Ombudsman*. 2010.

²² *What’s in a name? Use of the term ‘Ombudsman’* - 22 April 2008 - www.ombudsman.gov.au.

The basic definition of an advocate is someone who actively supports a cause, policy or idea. In the context of a Small Business Advocate, the Advocate could also independently inform on initiatives, legislation, or propositions which directly affect the small business sector.

This is a feature that could achieve widespread industry support. For example, in its Pre-Budget Submission 2011-12, the National Institute of Accountants recommends that the Government should establish the Office of Small Business Advocate to represent and advocate on behalf of small business and to foster regulatory reform²³.

A national approach to small business dispute resolution

Small business dispute resolution is an issue that is not only being considered by the Australian Government, but also within state and territory jurisdictions. Alternative dispute resolution for small business was on the agenda for discussion by Ministers at the Small Business Ministerial Council (SBMC) meeting in August 2010.

The Victorian Small Business Commissioner and the New South Wales Retail Tenancies Unit were noted by the Council as best practice models for Governments to consider when developing mechanisms to assist small businesses in the resolution of business disputes. The Council supported building alternative dispute resolution processes for small business and identifying gaps in assistance to resolve business to business disputes.

The South Australian, Western Australian and New South Wales governments have announced and are in the process of implementing a Small Business Commissioner based closely on the Victorian model.

South Australia, until recently, also had a Small Business Advocate. This role has now been discontinued, with the pending formation of the South Australian Small Business Commissioner taking over many of the functions of this role. From initial consultations, it appears that the Small Business Advocate model in South Australia was much more limited in its scope than the option proposed in this paper. In addition, the Advocate's mandate was limited to disputes between small business and the South Australian government. Within the Commonwealth, this role is already undertaken to a large degree by the Commonwealth Ombudsman.

National collaboration

A Small Business Advocate or Commissioner at the national level would also provide for an opportunity for collaboration with state and territory Small Business Commissioners or a similar relevant authority, to promote a national, consistent and coordinated approach to small business dispute resolution issues. The Commissioners at the state level could assist in identifying the gaps in existing services, which would in turn help in setting the agenda for the Advocate.

Due to the large number of industries represented in the small business sector, it may also be beneficial for the Advocate to be able to take counsel or advice from a committee of individuals with extensive experience in the small business sector.

Potential areas of policy research

Rather than trying to duplicate what the states and territories are doing at a national level, the proposed Small Business Advocate would be designed to enhance these services and fill in

²³ National Institute of Accountants, *Pre-Budget Submission 2011-12, recommendation 3.2.3.*

any gaps. In addition, it could shine a selective light into particularly difficult areas of small business activity, such as areas with high incidence rates of disputes.

One of the policy issues that could be explored by the Advocate is in relation to the late payment of small business invoices, which can have a critical impact on cash flow and lead to disputes.

The Small Business Dispute Resolution Survey²⁴ showed that 65 per cent of small business disputes related to the payment of goods and services. This was also a key issue raised during consultations for this options paper.

While the Government has a policy to pay small business invoices within 30 days, this example has had little to no impact on industry payment terms. One area of policy consideration could be the introduction of a prompt payment code. This is a mechanism used elsewhere in the world to encourage prompt payment of small business accounts. Another example is the European Union's Late Payment Directive ([2011/7/EU](#)) which includes an automatic entitlement to claim interest on late payments.

Private sector innovation

There are also some areas of innovation in relation to minimising disputes in the private sector which could be explored by the Advocate. This could involve the Advocate examining if a particular approach is working in one industry or area, to see if there may be scope for national implementation. For example, The Warren Centre for Advanced Engineering Limited undertook a comprehensive review of professional performance, innovation and risk in contemporary Australian professional engineering practice in 2009. The Warren Centre's report suggests that the benefits of changes from this review will result in fewer commercial disputes, better dispute resolution outcomes and more efficient use of the courts system with less litigation. Their best practice template provides a streamlined yet systemic process to identifying and resolving important issues 'up front'²⁵.

In addition to the Warren Centre example, recently Consult Australia²⁶ developed through Standards Australia, a new *Australian Standard 4122-2010 General Conditions of Contract for Consultants*. The widespread adoption of this standard with fair and reasonable commercial terms will streamline the process of engagement of consultants, improve clarity and certainty of contractual terms and conditions between clients and consultants and ultimately reduce disputes between clients and consultants based on contractual terms.

Appointment of the Small Business Advocate

It is considered imperative that the Small Business Advocate be a person considered by the small business community and Government alike to be a person of independence and integrity.

Ideally selection would be through an advertised, competitive, transparent, merit based selection process. This proposed process was supported during consultations for this paper.

It is important for the Advocate to be able to provide proactive advice to the Government on small business issues deemed important by the Advocate.

²⁴ <http://www.innovation.gov.au/SmallBusiness/Support/Documents/DisputeResolutionSurveyReport.pdf>

²⁵ <http://sydney.edu.au/warrencentre/PPIR/main.html>

²⁶ Together with the Association of Consulting Architects Australia; Australasian Procurement and Construction Council; Australian Constructors Association; Australian Institute of Architects; and Master Builders Australia Limited.

The Office of Small Business Advocacy

The Advocate would be supported by The OSBA which would be a newly created office. From a structural perspective, the Office of the Chief Scientist offers a model that could be used to design the structure of the OSBA. It has an independent head (Chief Scientist) which is supported and funded through a departmental arrangement.

As mentioned above, the Advocate could provide a function for early intervention and mediation where no similar state or territory mechanism exists or for identified cross-jurisdictional disputes. Early intervention services would allow parties to discuss their dispute with a convenor prior to more formal and expensive mediation and result in faster and cheaper dispute resolution. Early intervention, often over the phone, has proved to be successful in other jurisdictions and dispute resolution processes. The OSBA would maintain a panel of independent accredited mediators to provide this service.

International comparison: United States of America

The Small Business Administration (SBA) is the United States Government support agency for small business. Within the SBA, the Office of the National Ombudsman represents small business in disputes with federal agencies. The SBA also offers a wide range of business support programs.

The SBA's Office of Advocacy acts as "an independent voice for small business within the federal government".²⁷ The Office advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and policy makers. The Office of Advocacy analyses policies and their impact on small business.

It should be noted that small business in the United States is commonly defined as a firm with fewer than 500 employees, whereas the widely accepted Australian Bureau of Statistics definition is a business employing less than 20 people.

Focus questions

- Are there any other models, either nationally or internationally that might be more appropriate or effective?
- Initial consultation showed some reluctance to use the Advocate title. Is there a more suitable title?
- Should the proposed mediation services provided by the Advocate for small business be subsidised by the Government and if so, to what extent?
- With the large number of low-cost dispute resolution services already available for small business, should the function offered by the Advocate focus on education and referral as outlined in option one?
- The method of establishing the OSBA may be important in determining how it operates. What would be the optimal method for establishing the OSBA?
- What is the most favourable process for national collaboration on small business dispute resolution?
- Should the Advocate seek advice less formally from the small business community and be able to selectively act on the issue within Government?

²⁷ <http://www.sba.gov/advocacy>

APPENDIX 1

AUSTRALIAN SMALL BUSINESS DISPUTE RESOLUTION SERVICES (current as at March 2011)

NATIONAL LEVEL				
PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
Australian Federal Courts [Government provider]	<ul style="list-style-type: none"> • Mediation • Hearing • Trial 	<p>The Federal Magistrates Court has no exclusive jurisdiction. The court shares its jurisdiction of family law and child support, administrative law, bankruptcy, human rights, consumer protection and trade practices, privacy, migration, copyright, industrial law and admiralty law with the Family Court of Australia and the Federal Court of Australia.</p> <p>The Federal Court's jurisdiction is broad, covering almost all civil matters arising under Australian federal law. Cases arising under Part IV (restrictive trade practices) and Part V (consumer protection) of the <i>Competition and Consumer Act 2010</i> constitute a significant part of the workload of the Court. These cases may raise important public interest issues involving such matters as mergers, misuse of market power, exclusive dealing or false advertising. Other cases may only concern the immediate parties.</p> <p>The High Court of Australia is the highest court in the Australian judicial system. The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts.</p> <p>Mediation</p> <p>The Federal Magistrates Court utilises dispute resolution services because they are an affordable and timely option for resolving disputes. Mediation is the dispute resolution process usually adopted to resolve disputes in general federal law matters. When a federal magistrate orders parties involved in a dispute to attend mediation, it is usually conducted by a registrar of the Federal Court. In some cases, however, it is conducted by a private mediator. If an agreement is not reached, the case will proceed to a hearing.</p>	http://www.fmc.gov.au/pdr/index.html	<p>In most cases, the Federal Magistrates Court will pay for the dispute resolution it has ordered.</p> <p>http://www.fedcourt.gov.au/fff/fff_feesandcosts_fees.html#filing</p>

Australian Competition and Consumer Commission (ACCC) [Government provider]	Range of services including prescribed and non-prescribed industry codes of conduct.	The ACCC's primary responsibility is to ensure that individuals and businesses comply with the Commonwealth's competition, fair trading and consumer protection laws. The role of the ACCC is to administer the <i>Competition and Consumer Act 2010</i> and do this by: <ul style="list-style-type: none"> • preventing or deterring anti-competitive conduct so that all businesses have the opportunity to thrive, and to conduct their business in a way that is in the interests of the Australian public; and • protecting consumers against misleading and deceptive conduct. Steps for resolving disputes are outlined under mandatory and voluntary codes of conduct which have their basis in the Competition and Consumer Act 2010.	http://www.accc.gov.au/content/index.phtml/itemId/304583 An overview of these codes is provided below.	
Institute of Arbitrators and Mediators Australia (IAMA) [Industry association/ Private provider]	<ul style="list-style-type: none"> • Mediation • Arbitration • Conciliation • Adjudication • Expert determination • Training 	The IAMA was founded in 1975 and is Australia's leading ADR organisation. The IAMA provides services in all forms of ADR including arbitration, mediation, adjudication, conciliation and expert determination. It has a panel of skilled and experienced dispute resolvers covering many commercial areas and professional disciplines. Parties are able to select their dispute resolver from the Institute's panel of ADR professionals, or the Institute will nominate a suitable person on request.	http://www.iama.org.au/	IAMA charges a fee to nominate a dispute resolver – see: http://www.iama.org.au/general.htm The fees for cases vary widely and are up to the individual Arbitrator/Mediator/Expert to appraise it and the parties to set.
Australian Mediation Association (AMA) [Industry association/ Private provider]	<ul style="list-style-type: none"> • Information and education • Negotiation • Mediation 	The AMA is a group of mediators and conflict resolution practitioners who provide private mediation services, consulting services, and education in mediation, communication and negotiation, to help businesses and individuals avoid disputes through planning and to resolve disputes through mediation. The AMA can assist in resolving commercial, business and workplace disputes. The AMA will diagnose the dispute and appoint a suitable mediator depending on the situation.	http://www.ama.asn.au/	-
Australian Dispute Resolution Association (ADRA) [Industry assoc.]	<ul style="list-style-type: none"> • Information and education • Training 	ADRA was formed in 1987 and its objectives include: <ul style="list-style-type: none"> • promoting and encouraging ADR throughout Australia; • encouraging and facilitating the exchange of ideas, information and experience in ADR; • developing, maintaining and promoting ADR standards and achieving uniform national standards; • providing and supporting education and researching the theory and practice of ADR; 	http://www.adra.net.au/	-

		<ul style="list-style-type: none"> • printing, publishing and circulating ADR information; • enhancing professional skills of mediators, conciliators and other ADR practitioners and administrators; • making representations in the interests of ADRA members in all matters concerning the Association and resolving disputes by ADR; and • cooperating and affiliating with other organisations to achieve the objectives. 		
Lawyers Engaged in ADR (LEADR) [Industry association/ Private provider]	<ul style="list-style-type: none"> • Information and advice • Training • Mediation 	<p>An Australasian, not-for-profit membership organisation formed in 1989 to serve the community by promoting and facilitating the use of dispute resolution processes including mediation. LEADR refers mediators for commercial, employment, family and community/neighbourhood disputes.</p> <p>LEADR provides two levels of service to assist you to set up a mediation:</p> <ul style="list-style-type: none"> • Free referral service - LEADR will provide the profiles of three available mediators to choose among. A fee for the mediator's services is negotiated with and payable directly to the mediator. • Extended facilitation service - for a negotiated fee, LEADR will assist in choosing a mediator and will handle the administrative arrangements of the mediation. 	http://www.leadr.com.au/	-
Financial Ombudsman Scheme [Industry provider]	<ul style="list-style-type: none"> • Negotiation • Conciliation 	<p>The Financial Ombudsman Service attempts to independently resolve disputes between consumers, including some small businesses, and member financial services providers. Membership of the Financial Ombudsman Service is open to any financial services provider carrying on business in Australia.</p> <p>Independent dispute resolution processes cover financial services disputes including banking, credit, loans, general insurance, life insurance, financial planning, investments, stock broking, managed funds and pooled superannuation trusts. Dispute resolution methods may involve negotiation, conciliation, or reaching a decision.</p>	http://www.fos.org.au/entric/home_page.jsp	-
Tele-communication Industry Ombudsman (TIO) [Industry provider]	<ul style="list-style-type: none"> • Investigation 	<p>The TIO is a free and independent ADR scheme for small business and residential consumers in Australia with unresolved complaints about their telephone or internet services. The TIO aims to settle disputes quickly in a fair, objective and non-bureaucratic way, having regard not only to the law and to good industry practice, but also to what is fair and reasonable in all the circumstances.</p> <p>The TIO is 'an office of last resort'. This means that in the interests of fairness, the service provider must be given a reasonable opportunity to settle a complaint with a customer before the TIO will become involved.</p> <p>The TIO investigates complaints by considering the facts provided by both parties in a dispute. The TIO is not a consumer advocacy service but rather seeks to assist both parties to a dispute by reaching a fair and equitable resolution. The TIO is an industry-funded scheme, deriving its income solely from members who are charged fees for complaint resolution services provided by the TIO.</p>	http://www.tio.com.au	Free

<p>Produce and Grocery Industry Ombudsman Mediation Service (PGIO) [Industry provider/ Government provider]</p>	<ul style="list-style-type: none"> • Information and advice • Mediation • Voluntary code of conduct 	<p>The PGIO is set up by the industry to resolve disputes over supply of produce to markets and retailers. The service is funded by the Australian Government and is provided under the voluntary Produce and Grocery Industry Code of Conduct (PGIC). First contact is with the other party to try to resolve the problem - everyone in the industry is required to have internal procedures to resolve problems. The PGIO provides guidance and if the problem cannot be resolved through those procedures then the PGIO will appoint an Ombudsman's Representative to meet with the parties to reach agreement. The Ombudsman's Representative is a mediator and cannot force anyone to accept a decision but helps everyone to reach their own solution.</p>	<p>PGIO http://www.produceandgroceryombudsman.com.au/index.html</p> <p>PGIC http://www.produceandgrocerycode.com.au/</p>	<p>\$50 application fee The PGIO pays for the Ombudsman's Rep's time.</p>
<p>Horticulture Mediation Adviser [Industry provider/ Government provider]</p>	<ul style="list-style-type: none"> • Mediation • Mandatory code of conduct 	<p>Under the Horticulture Code of Conduct, growers and wholesalers can use any type of dispute resolution process they choose. In the first instance, the Code calls for the two parties to attempt to resolve the dispute themselves and, if that fails, to participate in mediation. However, if either a grower or wholesaler wishes to use the Code's dispute resolution process then the other trading party must comply.</p> <p>A mediation adviser will provide low cost mediation services under the code. The mediation adviser's role is to help parties resolve disputes and, on request, appoint mediators from a specialist panel of experienced mediators across Australia.</p>	<p>http://www.hortcodema.com.au/</p>	<p>\$50 application fee The Australian Government subsidises the mediator's fees to ensure the service is available to all parties. However, parties must pay their own expenses to attend mediation sessions.</p>
<p>Oilcode Dispute Resolution Adviser [Industry provider]</p>	<ul style="list-style-type: none"> • Information and advice • Mediation • Mandatory code of conduct 	<p>The Oilcode Dispute Resolution Adviser assists to resolve disputes between distributors, wholesalers or retailers about the supply of motor fuel in Australia. There are two main types of disputes defined under the Code: Disputes about Supply of a Declared Petroleum Product (section 43) and Other Disputes (section 44).</p> <p>Disputes made under section 43 allow for a non-binding determination to be made by the Dispute Resolution Adviser. For disputes under section 44, the parties must attempt to agree on how to resolve the dispute. Parties may agree to refer the matter to a mediator. If the parties cannot agree to refer the matter, the Dispute Resolution Adviser must then appoint a mediator.</p> <p>The Dispute Resolution Adviser has established a national panel of mediators who are also available to assist. Parties are still free to commence their own legal action at any time but following the Code's dispute resolution process is expected to result in quicker and less costly dispute resolution.</p>	<p>http://www.oilcodedra.com.au/disputes.html</p>	<p>-</p>

<p>Office of the Franchising Mediation Adviser (OFMA) [Industry provider]</p>	<ul style="list-style-type: none"> • Mandatory code of conduct • Referral to mediation 	<p>The Franchising Code of Conduct regulates conduct between franchisors and franchisees. The Code provides access to a cost effective dispute resolution scheme for franchises and franchisors to resolve their disputes. All franchise agreements entered into after 1 October 1998 must include an ADR process that complies with the Code. Any party to a franchise agreement may refer their dispute to a mediator of their choice. If they cannot agree on one, the parties can ask the OFMA to appoint a mediator. If a franchisee or franchisor requests mediation under the code, then both parties must attend the mediation and try to resolve the dispute.</p> <p>The OFMA, formerly the Office of the Mediation Adviser, was established in 1998 by the Australian Government Office of Small Business. The role of the OFMA is to appoint mediators to assist franchisors and franchisees to resolve their problems without going to court. The OFMA has a specialist panel of franchise dispute mediators in each State and Territory throughout Australia.</p> <p>Referral to mediation</p> <p>The OFMA will appoint a mediator within 14 days of receiving a written request to do so. The OFMA will send written confirmation of the mediator appointment to the parties involved. Once a mediator has been appointed by OFMA, the mediator will contact each party separately to prepare for the mediation and to arrange the date, time and place of mediation.</p>	<p>http://www.accc.gov.au/content/index.phtml/itemId/6118</p> <p>http://www.franchisingmediationadviser.com.au/</p>	<p>The cost of mediation is shared equally between the parties, unless agreed otherwise.</p> <p>On average mediation costs each party approx. \$1,400. These fees are payable directly to the mediator; there is no fee payable to OFMA.</p>
<p>Wine Industry Code of Conduct [Industry provider]</p>	<ul style="list-style-type: none"> • Voluntary code of conduct 	<p>The Wine Industry Code of Conduct has two main aims: to establish a common Australian wine grape supply contract framework; and to provide a dispute resolution system to manage disagreements which arise over price or quality assessments.</p> <p>The Code was developed by Wine Grape Growers Australia (WGGA) and the Winemakers' Federation of Australia (WFA) and is supported by the Federal Government's Department of Agriculture, Fisheries and Forestry. Participation is by invitation (to become signatories). The code applies to post 2009 vintages.</p>	<p>http://www.wineindustrycode.org/</p>	<p>-</p>

AUSTRALIAN CAPITAL TERRITORY

PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
ACT Conflict Resolution Service (CRS) [Community provider]	<ul style="list-style-type: none"> Information and advice Mediation 	<p>The CRS is a not-for-profit community organisation that was established in the 1988. It aims to provide professional, accessible and effective dispute resolution and training services to the ACT community that will help and empower people to prevent, manage and resolve disputes peacefully. The service can assist with disputes between a business and a customer, between business partners or even between competitors.</p> <p>Information and advice</p> <p>The CRS offers a dispute assessment line which is a free service to give advice and referral about your dispute.</p> <p>Mediation</p> <p>Before mediation, each person involved in the dispute must agree to be interviewed by a Dispute Assessment Officer in order for CRS to decide if the dispute is suitable for mediation and what is the best way for CRS to assist everyone. If mediation is considered appropriate, the CRS will contact the other person and invite them to attend mediation and arrange a time and place that is convenient for all involved.</p>	http://www.crs.org.au/html/commercial_small_business.htm	<p>Charges are based on sliding scale of gross income.</p> <p>Separate charges apply for each party to the mediation.</p>
ACT Civil and Administrative Tribunal (ACAT) [Government provider]	<ul style="list-style-type: none"> Referral to ADR Hearing 	<p>The ACAT provides a forum for the determination of a wide range of civil disputes, requests for review of administrative decisions and professional and occupational disciplinary matters. The ACAT commenced on 2 February 2009 and took over the work of a number of existing tribunals and boards including the Small Claims Court. The ACAT hears civil disputes and small claims up to \$10,000.</p> <p>Referral to ADR</p> <p>Disputing parties are encouraged to consider working towards a solution through ADR before the hearing is listed to be heard. Conferencing, mediations, case appraisal or conciliation options are available upon application to the Tribunal staff.</p> <p>Hearing</p> <p>At hearing, the tribunal members will encourage both parties to discuss the dispute and may suggest ways in which it might be settled. If an agreement is not reached, the Tribunal will make a Decision. Both agreements and Decisions are binding and can be enforced in the same way as an order of the Court.</p>	http://www.acat.act.gov.au/	<p>Schedule of fees available at:</p> <p>http://www.acat.act.gov.au/content.php?id=7</p>

ACT Courts [Government provider]	<ul style="list-style-type: none"> • Case management • Referral to ADR • Hearing • Trial 	<p>The ACT courts system includes the Magistrates Court and the Supreme Court. The Magistrates Court hears civil disputes, including commercial and retail lease disputes, between \$10,000-\$50,000. The Supreme Court hears civil disputes over \$50,000.</p> <p>Case management/Referral to ADR</p> <p>The Magistrates Court has jurisdiction to decide applications made under the <i>Leases (Commercial & Retail) Act 2001</i>. On receiving the application, the Magistrates Court may hold a case management meeting to assess the likelihood of the parties resolving the dispute through ADR before proceeding to the hearing. The Act does not provide for mandatory mediation but the Court can refer the dispute to ADR and adjourn the proceeding for a stated period to allow the parties to settle the dispute through ADR.</p> <p>Hearing/Trial</p> <p>If the Court considers it unlikely ADR will resolve the dispute, the Court must facilitate hearing the dispute as quickly as possible and minimise costs for the parties. A dispute may be referred to or appealed in the Supreme Court.</p>	http://www.courts.act.gov.au/magistrates/index.html	<p>Schedule of fees available at: http://www.courts.act.gov.au/magistrates/index.html</p> <p>The parties are to bear their own costs unless the Court orders otherwise.</p>
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NEW SOUTH WALES				
PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
Community Justice Centres [government provider]	<ul style="list-style-type: none"> • Mediation 	<p>A wide range of disputes involving businesses are suitable for mediation at Community Justice Centres (CJC), including disputes with customers, suppliers, and contractors. Mediation is a positive process which encourages cooperative problem-solving and preserves relationships. It works well if the parties come to the table in “good faith”, and are willing and able to negotiate freely. This may not be possible in cases where one party does not wish to agree, or come to mediation. Mediation is voluntary (unless a court has made an order for the parties to attend mediation) and CJC cannot force anyone to attend mediation or stay at mediation. Mediation with CJC can be held prior to commencing legal proceedings, or at any point during those proceedings.</p> <p>A mediation session typically takes between two and four hours. Usually one session is sufficient but additional sessions can be arranged if necessary.</p> <p>Most agreements are made in good faith and it is up to the parties to keep the agreement. Agreements can be made legally binding if the parties choose. CJC cannot enforce agreements which have reached at mediation.</p> <p>Process</p> <p>CJC can usually arrange a mediation within a week of all parties agreeing to mediate:</p>	www.cjc.nsw.gov.au	<p>Cost is free</p>

		<ul style="list-style-type: none"> • A letter is sent by the CJC to the other party inviting them to a mediation session to discuss the concerns raised. If a response is not received by CJC after 10 days, a second letter is sent. <p>If the other party does not contact CJC after a third and final letter is sent, CJC's involvement ends.</p>		
Retail Tenancy Unit NSW Fair Trading, Department of Services, Technology and Administration (DSTA) [government provider]	<ul style="list-style-type: none"> • Mediation and advisory services. 	<p>In NSW, mediation assistance to resolve retail leasing disputes is available to all firms, including small businesses. Its Retail Tenancy Unit has an 80% success rate in resolving retail leasing disputes through mediation.</p> <p>Available services for small business</p> <p>A 1300 number is provided for landlords, tenants, managing agents, and solicitors to call for free advice and assistance in relation to retail lease matters. Informal mediation is also available at no cost to the parties. Formal mediation is conducted at a cost to each party of \$760 for 5 hours (\$644 if it relates to a retail bond).</p> <p>Process</p> <p>Under the <i>Retail Leases Act 1994</i>, parties to a retail tenancy dispute must apply to the Retail Tenancy Unit (NSW Fair Trading, Dept of Services, Technology and Administration) for mediation before proceedings can commence in the Administrative Decisions Tribunal. The NSW Registrar of Retail Tenancy Disputes, appointed under the Act by the NSW Minister for Small Business, will then make arrangements to facilitate the resolution of the dispute by mediation. Mediation is not limited to formal procedures, and includes preliminary assistance and advice, facilitation of communication, and other forms of ADR.</p> <p>If the dispute continues, the parties can then have the matter heard by the Administrative Decisions Tribunal, which has a Retail Leases Division with jurisdiction to hear claims of up to \$400,000. The practice in the ADT supports the operation of the Registrar of Retail Tenancy Disputes through their directions to parties and their powers to award costs. Claims over \$400,000 are heard in the District or Supreme Court of NSW.</p> <p>The practice for mediation in NSW retail lease disputes is similar to the practices for Victorian retail lease disputes overseen by the Victorian Small Business Commissioner. The Registrar in NSW is not an advocate for any party and has no power to determine retail lease claims or provide legal advice.</p>	<p>Source: NSW Retail Tenancy Unit, DSTA, Feb 2011. Refer also www.fairtrading.nsw.gov.au/Businesses/Retail_tenancy/Resolving_retail_tenancy_disputes.html</p>	<p>No cost for free advice (1300 number) or informal mediation. Formal mediations conducted at a cost to both parties (\$760 for 5 hours; \$644 if it relates to a retail bond).</p>
Consumer Trader and Tenancy Tribunal (CTTT) [government provider]	<ul style="list-style-type: none"> • Dispute resolution/ conciliation process. 	<p>The primary function of the CTTT is to resolve disputes about the supply of goods and services, and issues relating to residential property. The CTTT aims to provide an efficient, inexpensive, informal and fair dispute resolution service.</p> <p>The conciliation process involves bringing the people in dispute together to talk about their issues in an informal, private meeting and try to reach an agreement.</p> <p>The conciliation process is closely linked to the hearing process, rather than as a separate step of dispute resolution, and is regularly used in conjunction with group listings. Conciliation is also used extensively in matters involving multiple applications</p>	<p>www.cttt.nsw.gov.au/Dispute_resolution.html</p>	<p>Generally, the fee for an application to the Tribunal is \$35 and \$5 for students and pensioners.</p> <p>(The fee depends on the type of application and the amount of the</p>

		about the same dispute, for example in residential parks and retirement village matters.		claim).
Small Claims Division, Local Court	<ul style="list-style-type: none"> • Mediation • Hearing • Trial. 	<p>The Small Claims Division of the NSW Local Court deals with civil disputes involving monetary claims up to \$10,000. By contrast, claims over \$10,000 (but under \$100,000) are determined in the General Division of the Local Court, with hearings conducted by a Magistrate or in some cases, an Arbitrator.</p> <p>Small claims hearings are held before an Assessor or a Magistrate. Some cases can also be referred to mediation. Parties are encouraged to contact the Community Justice Centre (CJC) to assist with mediation. If an agreement is reached it may be possible to file consent orders with the court to make the agreement legally binding.</p> <p>At the <i>pre trial review</i> stage, the court may propose that the parties attend a CJC mediation session if they have not already done so. If the matter remains unsettled the court will determine the scope of the issues to be determined at the hearing. Most <i>small claims hearings</i> take less than one hour to complete with as little formality as possible; the rules of evidence and procedural rules relating to formal trials do not apply. The court may award legal costs to the successful party following the hearing. Legal costs are limited to the amount that may be awarded for a default judgment.</p>	<p>Details on local courts incl. Small Claims Division</p> <p>www.ipc.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_money_issues</p> <p>In addition, LawAccess NSW [1300 888 529] is a free legal advisory service for people who live in NSW/have a legal problem in NSW.</p> <p>www.lawaccess.nsw.gov.au</p>	<p>The mediation process is free to the injured worker.</p> <p>Work Health charge the five major work health insurers twice a year for the average costs of mediation for the preceding period.</p>
Mediation in the District Court [government provider]	<ul style="list-style-type: none"> • Court-annexed mediation or private mediation. 	<p>The District Court has jurisdiction to hear claims to a maximum amount of \$750,000, although it may deal with matters exceeding this amount if the parties consent.</p> <p>70% of the civil work of the District Court is undertaken by the Sydney District Court. Pursuant to District Court (Civil) Practice Note 1, disputes before the Sydney District Court are referred to mediation prior to a hearing unless the parties can satisfy the Court that mediation is not appropriate. Just about all commercial / mercantile / contractual disputes would be referred to mediation unless the parties had undertaken a previous mediation. The referral may be either to private mediation or court-annexed mediation. Approximately 25% of the matters referred to mediation are referred to court-annexed mediation.</p>	<p>http://infolink.lawlink/district_court/ll_districtcourt.nsf/pages/dc_index. See Practice Note 1 and Frequently Asked Questions</p>	<p>For court-annexed mediation there is no charge for the mediator or the mediation rooms. For private mediation, parties organise and pay the mediator direct.</p>

<p>Mediation in the NSW Supreme Court [government provider]</p>	<ul style="list-style-type: none"> • Court-annexed mediation or private mediation. 	<p>Cases may be referred to mediation by a court order. The parties can ask the Court to make an order for referral, or the Court may consider the case appropriate for referral, even if the parties do not ask. The Court has the power to make a referral to mediation with or without the consent of parties. Parties can use either of two types of mediation – court-annexed mediation or private mediation.</p> <p>With court-annexed mediation, there is no charge for the mediator or use of rooms. The cost of legal representation is the responsibility of each party.</p> <p>With private mediation, there are usually fees for the mediator and also for the use of rooms. In addition, some mediation agencies charge a commission/registration fee. Some mediators charge for preparation time separately from the mediation session. Private mediation costs vary from mediator to mediator.</p>	<p>www.bocsar.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mediation#15</p>	<p>With court-annexed mediation, there is no charge for the mediator or use of rooms. The cost of legal representation is the responsibility of each party. Private mediation costs vary from mediator to mediator.</p>
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NORTHERN TERRITORY				
PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
<p>Community Justice Centre (CJC), Department of Justice [Government provider]</p>	<ul style="list-style-type: none"> • Information and advice • Mediation 	<p>The CJC has been established by the Northern Territory Government to provide mediation services to the community to help people resolve their own disputes without legal action. The CJC can assist with a wide range of disputes including neighbourhood disputes, family disputes and small claims/civil disputes.</p> <p>The CJC can be contacted via a free call number, post, email or in person. Experienced staff will:</p> <ul style="list-style-type: none"> • talk about the problem and discuss ways the parties can resolve it themselves; • provide information and/or referral; • assess if your dispute is suitable for mediation and if so, ask for brief information about you, your concerns and the other person/s involved; and • with permission, contact the other person/s to arrange mediation at a time convenient to both parties. 	<p>http://www.cjc.nt.gov.au</p>	<p>Free</p>

<p>Northern Territory Courts [Government provider]</p>	<ul style="list-style-type: none"> • Judgement awarded by the Court • Hearing • Case management • Trial 	<p>The Northern Territory courts system includes the Magistrates Court and the Supreme Court. Generally, the Small Claims Court (part of the Local Court) can determine civil claims with a value under \$10,000, the Local Court (part of the Magistrates Court) between \$10,000-\$100,000, and the Supreme Court above \$100,000.</p> <p>The Small Claims Court is not bound by the rules of evidence and may inform itself in any manner it thinks appropriate. Costs are not usually awarded and the aim is to settle disputes quickly with minimum expense to the parties.</p> <p>Judgement/Hearing</p> <p>If the Defendant fails to settle the claim, pay the claim in full or pay the claim in instalments the Plaintiff can apply for judgement without a court hearing. Even after this has happened, the Defendant may apply to have the judgement set aside and the matter re-heard.</p> <p>Case management/Trial</p> <p>All civil matters are case-managed by the Supreme Court. Many cases are case managed by the Master and Registrar of the Court and are settled without any Judge involvement at all. Case management reduces the costs involved and encourages parties in civil proceedings to sort matters out without the need for a trial.</p> <p>If a matter does proceed to trial, it would usually be heard by a Judge alone, although there is a limited power, rarely used, for trial by a Judge and Jury of four.</p>	<p>http://www.nt.gov.au/justice/ntmc/</p> <p>http://www.supremecourt.nt.gov.au/</p>	<p>Small Claims Court: \$80 to file a claim \$55 to apply for re-hearing</p> <p>Court costs may be awarded if the claim is for more than \$5,000 and if the Court considers it reasonable to do so.</p> <p>Local Court: \$5,000 to \$10,000 - \$200 \$10,000 to \$20,000 - \$320 \$20,000 to \$100,000 - \$400 Plus other fees</p>
<p>Worksafe Department of Justice [Government provider]</p>	<ul style="list-style-type: none"> • Mediation 	<p>The Work Health Mediation Process provides Northern Territory workers, employers and insurers with a service that facilitates the resolution of workers compensation disputes by involving all parties in an informal process to achieve a mutually acceptable agreement.</p> <p>The role of the mediation process is to:</p> <ul style="list-style-type: none"> • Assist the parties to achieve resolution; • Be even handed and fair; • Maximize flexibility and informality; • Be prompt and timely in the conduct of mediation processes and in dealings with the parties; and • Endeavour to ensure that matters do not unnecessarily proceed to the courts. <p>Worksafe provide a venue for the mediation to take place but do not conduct the mediation.</p> <p>Mediators are private service providers.</p>	<p>mediationworksafe@nt.gov.au</p>	<p>The mediation process is free to the injured worker.</p> <p>Work Health charges the five major work health insurers twice a year for the average costs of mediation for the preceding period.</p>

Consumer Affairs Department of Justice [Government provider]	<ul style="list-style-type: none"> Dispute resolution 	Offers a range of dispute resolution processes including: <ul style="list-style-type: none"> Fair Trading Officers working with traders and consumers to negotiate a solution Tenancy hearings conducted by Consumer Affairs (residential tenancies) The Commissioner of Business Tenancies mediating disputes between tenants and landlords.	http://www.nt.gov.au/justice/consaffairs/index.shtml	Negotiation for a solution for consumer vs. traders is a free service. Tenancy hearings for residential tenancies are free. Business tenancies mediations are arranged at a cost to both parties.
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QUEENSLAND				
PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
Queensland Department of Justice and Attorney-General (JAG) [Government provider]	<ul style="list-style-type: none"> Information and advice Mediation Justice Mediation Facilitation Legal enforcement of agreements 	JAG has dispute resolution centres and mediators located throughout Queensland. JAG mediation offers an alternative way of settling disputes before they get to court. Trained mediators act as an impartial third party through a structured mediation process. Mediation When a dispute resolution centre is contacted, staff will take some details about the dispute and the disputing parties. If the matter is suitable for mediation, staff will then contact the other party, explain about mediation, and invite them to participate.	http://www.justice.qld.gov.au/justice-services/dispute-resolution	Business-to-business disputes cost \$110/hr for the intake process and \$205/hr for the mediation process.
Queensland Civil and Administrative Tribunal (QCAT) [Government provider]	<ul style="list-style-type: none"> Mediation Hearing 	QCAT is part of the justice administration division within the Department of Justice and Attorney-General. QCAT began operations on 1 December 2009 amalgamating 23 of the state's tribunals and bodies. QCAT administers the following business areas: Small Claims Tribunal; Minor Debt Claims; Health Practitioners Tribunal; and the Legal Practitioners Tribunal. QCAT makes decisions concerning guardianship, residential and retail tenancy disputes, debt, consumer, trader, building and minor civil disputes (less than \$7,500), matters affecting children and young people, antidiscrimination matters, occupational and business regulation matters and reviews administrative decisions.	http://www.qcat.qld.gov.au/	Fees vary depending on the Act under which the dispute falls. Retail shop lease disputes pay an application fee of \$175. Generally, each party must pay their own costs when using

		Retail tenancy disputes are resolved through a two-step process which involves mediation and if the dispute is not resolved at mediation, a hearing by QCAT.		QCAT, however, application can be made for the fee to be waived in cases of financial hardship.
Queensland Courts [Government provider]	<ul style="list-style-type: none"> • Mediation • Case appraisal • Hearing • Trial 	<p>The Queensland Courts system includes the Magistrates Court, District Court and Supreme Court. The Magistrates Court can determine civil claims with a value between \$7,500-\$50,000, the District Court between \$50,000-\$250,000 and the Supreme Court over \$250,000.</p> <p>Two forms of ADR are used in civil cases in both the District and Supreme Courts:</p> <ul style="list-style-type: none"> • mediation - where an independent person or mediator helps the parties to negotiate an agreement to resolve the dispute, or part of it; and • case appraisal - where an independent person or case appraiser assesses the merits of the case and makes a decision similar to a judgment of the court. <p>The process used depends on which is more likely to be successful in the particular case. ADR can be voluntary or ordered by the court. The court may order ADR if:</p> <ul style="list-style-type: none"> • the parties have not agreed to voluntarily try mediation or case appraisal; and/or • ADR wasn't considered, e.g. when one party files an application in court for the performance of pre-trial steps and the court considers that it is an appropriate dispute for referral to ADR. <p>ADR is based on both the <i>Supreme Court of Queensland Act 1991</i> the District Court Act (1967) and the <i>Uniform Civil Procedures Rules 1999</i>. Mediation services are also available in the Magistrates Court.</p>	http://www.courts.qld.gov.au/	<p>Mediation/ case appraisal - charged for the services of the mediator or case appraiser unless the court orders otherwise. Fees vary and generally, each party pays an equal proportion of this fee.</p> <p>Hearing/ trial - fees vary depending on the type of dispute. Fees are generally higher the greater the value of the dispute.</p>
Queensland Law Society (QLS) [Industry provider]	<ul style="list-style-type: none"> • Information and advice • Mediation • Conciliation • Arbitration 	The QLS provides dispute resolution methods include mediation, conciliation, collaborative law and arbitration services. Mediators are accredited with the QLS under the National Mediator Accreditation scheme which has high standards of training, continuing education, mediator experience and discipline.	www.qls.com.au	Mediators charge an hourly rate which varies depending on their experience etc.
Energy Ombudsman Queensland (EOQ) [Industry provider]	<ul style="list-style-type: none"> • Information and advice • Mediation 	The EOQ is an independent dispute resolution service for Queensland's energy consumers, including small business energy consumers, who have been unable to resolve a problem with their electricity or reticulated gas supplier. If the dispute cannot be resolved through negotiation or informal mediation, the Energy Ombudsman may decide to make an order to resolve the dispute.	www.eoq.com.au/	Free
Legal Services Commission (LSC) [Industry provider]	<ul style="list-style-type: none"> • Information and advice • Mediation 	The LSC can either mediate complaints themselves or may decide to refer a complaint for mediation to the Queensland Law Society or the Bar Association of Queensland.	www.lsc.qld.gov.au	-

provider]				
Building and Construction Industry Payments Agency (BCIPA) [Industry provider]	<ul style="list-style-type: none"> • Information and advice • Adjudication 	The <i>Building & Construction Industry Payments Act 2004</i> was created to provide an alternative to the court system to resolve payment disputes.	www.bcipa.qld.gov.au	Adjudicators charge an hourly rate which varies depending on their experience etc.

SOUTH AUSTRALIA

PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
Office of Consumer and Business Affairs (OCBA) [Government provider]	<ul style="list-style-type: none"> • Information and advice • Mediation 	<p>The OCBA is a division of the Attorney-General's Department within the South Australian Government's Justice Portfolio. The OCBA administers an independent mediation service provided by a panel of independent mediators (also barristers) appointed by the Minister.</p> <p>Mediation</p> <p>The OCBA mediation service focuses on retail and commercial tenancy disputes. If the parties to a lease cannot resolve a dispute through their own negotiations, either party may apply for mediation (attendance is not mandatory). If a dispute cannot be resolved by negotiation or mediation, the matter will have to be taken to the Civil (Consumer and Business) Division of the Magistrates Court.</p>	<p>http://www.ocba.sa.gov.au/tenancies/retailtenancies/mediation.html</p> <p>The conventional wisdom holds that the cost of mediation (relative to the Magistrates Court) and its voluntary nature result in the service being so little used.</p>	Mediation fees start at \$1,500 for a 3 hour session and are payable jointly by both parties.
South Australian Courts [Government provider]	<ul style="list-style-type: none"> • Mediation • Hearing • Trial 	<p>The South Australian courts system includes the Magistrates Court, District Court and Supreme Court. Generally, the Magistrates Court can determine civil claims up to the value of \$40,000 and the District Court above \$40,000.</p> <p>Mediation</p> <p>In the Civil Division of the Magistrates Court there is an option of mediation for resolving minor civil and general claims. Cases can be referred for mediation upon request at the first (Directions) hearing. It is possible to apply for mediation at a later stage in court proceedings.</p> <p>Mediations come from minor civil matters referred by Registrars from minor civil directions hearings and general matters referred by Magistrates. Parties continue to take up the opportunity to negotiate a mutually-agreeable resolution to a dispute rather than going to trial.</p> <p>An online pre-lodgment system was introduced in July 1999, enabling individuals,</p>	<p>http://www.courts.sa.gov.au/courts/magistrates/mediation.html</p> <p>Data and information provided relates to all matters – not solely business to business disputes.</p>	<p>Mediation is free</p> <p>A schedule of fees for the Magistrates Court is available at: http://www.courts.sa.gov.au/courts/magistrates/index.html</p>

		businesses and organisations to try to resolve disputes rather than resort to formal proceedings. The pre-lodgment system offers a free mediation service through the Magistrates Court, with mediations conducted by volunteer mediators.		
Proposed Small Business Commissioner	<ul style="list-style-type: none"> • Information and advice • Investigation • Advocacy • Representation • Mediation • ADR 	<p>Historically, the Small Business Advocate handles small business to government complaints by:</p> <ul style="list-style-type: none"> • investigating complaints from small business and negotiates with the relevant State Government agencies on behalf of small business; • working to reduce the number of complaints by advising government departments and agencies on more 'business friendly' approaches to small business policies, practices and procedures; and • representing the interests of small business by monitoring relevant government policies and legislation and offering advice on changes based on feedback. <p>There is currently draft legislation which proposes a Small Business Commissioner. It is modeled on the successful Victorian approach.</p>	www.southaustralia.biz/sbc	Free

TASMANIA				
PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
Consumer Affairs & Fair Trading (CAFT) [Government provider]	<ul style="list-style-type: none"> • Information and advice • Complaint / Investigation management • Conciliation 	<p>Information and advice CAFT provides a Telephone Advisory Service to callers on a '1300' helpline (maximum of 2 officers answering calls during business hours only). The majority of calls are from consumers.</p> <p>Complaint / Investigation management 1.5 Investigation Officers focus on providing conciliation to resolve issues. Breaches of legislation administered by CAFT may result in prosecution.</p>	<p>http://www.consumer.tas.gov.au/fair_trading/advice_and_complaints</p> <p>http://www.consumer.tas.gov.au/fair_trading</p>	-
Tasmanian Courts [Government provider]	<ul style="list-style-type: none"> • Mediation • Conciliation • Hearing • Trial 	<p>The Tasmania court system includes the Magistrates Court and the Supreme Court. The Magistrates Court deals with disputes involving amounts up to \$50,000 in value and amounts in excess of \$50,000 if all parties agree.</p> <p>Mediation If the claim is defended and the amount of claim is under \$5,000 it will proceed to a mediation conference. If the amount of the claim is over \$5,000 it will proceed to a directions hearing held before a Magistrate for the purpose of:</p> <ul style="list-style-type: none"> • clarifying the issues in dispute; • ensuring both sides have prepared their case; • exploring possibilities of settlement; 	http://www.magistratescourt.tas.gov.au/division/civil/Mediation_and_Conciliation	<p>http://www.magistratescourt.tas.gov.au/nested_content/fees_1July_2010</p> <p>There is no charge for the court's facilities or for the conciliator's time for the conference. The costs of the solicitors are costs in the cause, which means that</p>

	<ul style="list-style-type: none"> • offering ADR procedures; and • making any other pre-trial orders that are considered appropriate. <p>Conciliation At a later time before trial, conciliation conferences may be ordered by the Court to assist in settling the dispute. Conciliation conferences provide the primary opportunity to resolve the dispute by negotiating a mutually agreeable resolution or compromise.</p>		whoever is unsuccessful will normally pay the costs of both parties' solicitors for the time at the conference.
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VICTORIA				
PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
<p>Private mediators [Industry association/ Private provider]</p>	<ul style="list-style-type: none"> • Facilitation • Mediation • Conciliation 	<p>Victorian industry associations include the Victorian Association for Dispute Resolution, the Victorian Bar and the Law Institute of Victoria. Members can be contacted through the website to arrange private mediation.</p>	<p>http://www.vadr.asn.au/index.html http://www.vicbar.com.au/ http://www.liv.asn.au/Default.aspx</p>	
<p>Office of the Victorian Small Business Commissioner (VSBC) [Government provider]</p>	<ul style="list-style-type: none"> • Information and advice • Mediation 	<p>The VSBC was established in May 2003 to promote greater fairness in business through its four main functions: information and education; review of government practices; investigation of small business complaints; and dispute resolution. The VSBC operates under three key pieces of legislation:</p> <ul style="list-style-type: none"> • <i>Small Business Commissioner Act 2003</i> (SBC Act 2003); • <i>Retail Leases Act 2003</i> (RL Act 2003); and • <i>Owner Drivers and Forestry Contractors Act 2005</i> (ODFC Act 2005). <p>Information and advice A VSBC officer can provide preliminary information and advice via the website or phone line.</p> <p>Mediation A small business can submit an application for mediation by mail, email or online. A VSBC officer will then contact the small businesses involved and if it is deemed that mediation is the appropriate course of action, the VSBC will organise both parties to attend a mediation session at the earliest date.</p>	<p>www.sbc.vic.gov.au</p>	<p>Disputes under the SBC Act 2003 and the RL Act 2003 – each party contributes \$195 and the VSBC contributes \$510.</p> <p>Disputes under the ODFC Act 2005 – each party contributes \$95 and the VSBC contributes \$710.</p>

<p>Dispute Settlement Centre of Victoria (DSCV), Department of Justice [Government provider]</p>	<ul style="list-style-type: none"> • Information and advice • Mediation 	<p>The DSCV was established in 1987 to provide mediation as an alternative to the court system to resolve disputes. The Centre provides neutral, objective information, advice and mediation services to help resolve disputes of any size or complexity. The DSCV also runs the Rural Dispute Settlement Centre (RDSC) which helps people living in rural and regional areas to deal with disputes. The DSCV deals with a wide range of disputes including business disputes, however, this is not its primary focus.</p> <p>Information and advice</p> <p>Information and advice is available on the 'disputeinfo' website or by calling the Dispute Resolution Advisory Service, which offers advice over the phone about how to resolve disputes or prevent them from occurring.</p> <p>Mediation</p> <p>A small business with a dispute can call the DSCV and request mediation. A Dispute Assessment Officer will discuss ways to resolve the dispute and explains how mediation works. If the caller requests mediation, the DSCV writes to invite the other party to mediate. If the other party agrees to mediate, the officer organises a mediation session.</p>	<p>www.justice.vic.gov.au/disputes</p> <p>www.justice.vic.gov.au/disputeinfo</p>	<p>Free</p>
<p>Victorian Civil and Administrative Tribunal (VCAT) [Government provider]</p>	<ul style="list-style-type: none"> • Mediation • Hearing 	<p>The VCAT was established in July 1998 and amalgamated 15 boards and tribunals to offer a one-stop-shop dealing with a range of disputes, providing Victorians with access to a civil justice system which is modern, accessible, efficient and cost effective.</p> <p>VCAT handles human rights, administrative and civil disputes. The main business dispute VCAT mediates is retail tenancy disputes under the <i>Retail Leases Act 2003</i> and the <i>Fair Trading Act 1999</i>. Most retail tenancy cases have been referred to VCAT by the VSBC.</p> <p>Mediation and hearing</p> <p>Claims \$15,000 or less - subject to a small claims procedure. The dispute will be referred to a mediation session (maximum 2 hours). If the dispute is not resolved during mediation, it will be referred to immediate hearing on the same day conducted by a tribunal member.</p> <p>Claims \$15,000-\$100,000 - referred first to mediation. If the dispute is not resolved during mediation, a preliminary hearing will be conducted to give directions for the final hearing.</p> <p>Claims \$100,000 or more - subject to a preliminary hearing prior to a final hearing. The dispute may be referred to mediation at any stage before the final hearing.</p>	<p>http://www.vcat.vic.gov.au</p> <p>The information in this table relates to retail tenancy disputes only.</p>	<p>The standard application fee is \$300.40, however, fees range from \$0-1204.10 depending on the type of dispute.</p> <p>Hearing fees:</p> <p>1-5 days \$120.40 per day</p> <p>6-9 days \$240.80 per day</p> <p>9+ days \$300.40 per day</p> <p>If a dispute proceeds to a final hearing, VCAT can determine costs to be paid by the losing party.</p>

<p>Victorian Courts [Government provider]</p>	<ul style="list-style-type: none"> • Pre-hearing conference • Mediation • Hearing • Trial 	<p>The Victorian Courts system includes the Magistrates Court, County Court and Supreme Court. Generally, the Magistrates Court can determine civil claims up to the value of \$100,000, the County Court between \$100,000-\$200,000, and the Supreme Court over \$200,000. However, in certain circumstances the Magistrates Court and County Court can hear cases with an unlimited value.</p> <p>The Victorian Courts system supports ADR and encourages use of the DSCV. For instance, all defended matters in the Magistrates Court are referred to a pre-hearing conference or mediation. Mediation is ordinarily reserved for the more complex matters, where the amount in dispute is \$30,000 or more and may on occasion be ordered without the consent of the parties at the first directions hearing.</p> <p>Pre-hearing conference</p> <p>Pre-hearing conference dates are fixed by order of the court to be conducted within six to eight weeks after receipt of the notice of defence. A pre-hearing conference is normally conducted by a court constituted by a registrar, but may be conducted by a judicial registrar or a magistrate. At a pre-hearing conference, the registrar will assist the parties in attempting to reach agreement to resolve the dispute. Where this cannot be achieved, the issues in dispute will be identified and the matter will be listed for hearing or arbitration.</p> <p>Mediation</p> <p>Before mediation is ordered, the registrar will inform the parties by written notice that the matter appears to be suitable for mediation. Unless a party raises an issue for consideration, a mediation referral order will be made after 21 days from the date of the notice. The parties must agree on the mediator to be appointed and the date and time of the mediation. A court registrar may be requested to mediate, subject to the registrar's availability. A mediator may only adjourn the mediation by agreement of all the parties and has no power to make orders in the proceeding.</p>	<p>http://www.magistratescourt.vic.gov.au/</p> <p>http://www.countycourt.vic.gov.au</p> <p>http://www.supremecourt.vic.gov.au/</p>	<p>Fees are scaled based on the value of the dispute. The Court or registrar may allow a greater or lesser sum than the scale provides if they consider any item to be inadequate or excessive. If the scale does not provide for any case, the Court or registrar may allow reasonable costs.</p>
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WESTERN AUSTRALIA

PROVIDER	TYPE OF SERVICE	DESCRIPTION	COMMENTS/ LINKS	AVERAGE COST
Citizens Advice Bureau Western Australia (CABWA) [Community provider]	<ul style="list-style-type: none"> • Facilitation • Mediation 	The CABWA is a not-for-profit information and referral service. Among its services is a mediation service which provides professionally trained mediators to guide parties towards a solution that is agreeable to both parties. The Western Australian Government provides \$30,000 funding each year to the CABWA's mediation branch. There are generally two mediators present to ensure neutrality and equity. There are three main types of mediations conducted by the CABWA including family and child mediations, community mediations and commercial mediations. The CABWA's commercial mediations include specifically workplace disputes and small business disputes.	http://www.cabwa.com.au/	The CABWA charges upwards of \$125 for each party to attend mediation. The charges are based on the level of complexity and the size of the business.
Small Business Development Corporation (SBDC) Advisory Services [Government provider]	<ul style="list-style-type: none"> • Information and advice 	The SBDC provides information and guidance to small businesses on resolving business disputes. The SBDC has an in-house commercial tenancy expert who is available to provide advice on matters relating to the Western Australian <i>Commercial Tenancy (Retail Shops) Agreement Act 1985</i> .	http://www.smallbusiness.wa.gov.au/dispute-resolution/ The website also contains information on leasing commercial premises. See http://www.smallbusiness.wa.gov.au/leasing-a-commercial-premises/	Free
State Administrative Tribunal (SAT) [Government provider]	<ul style="list-style-type: none"> • Mediation • Conference • Hearing 	The SAT was established in 2005 as a result of an amalgamation of nearly 50 industry and public sector boards and tribunals. The SAT is an independent body that makes and reviews administrative decisions. It has four tribunal streams including the Human Rights, Development and Resources, Vocational Regulation, and Commercial and Civil streams. Business to business disputes are handled primarily by the Commercial and Civil stream. Applications are heard initially at a directions hearing where they are scheduled for mediation, a compulsory conference or a final hearing.	www.sat.justice.wa.gov.au	Approximate fees for a commercial tenancy matter include an application fee of \$64.50 and a hearing fee of \$129 (for each day or part of a day allocated, other than the first day).

<p>Western Australia Courts [Government provider]</p>	<ul style="list-style-type: none"> • Pre-trial conference • Mediation • Hearing • Trial 	<p>The Western Australian Courts system includes the Magistrates Court, District Court and Supreme Court. Generally, the Magistrates Court can determine civil claims up to \$75,000, the District Court between \$75,000-\$750,000 and the Supreme Court over \$750,000.</p> <p>The Western Australian Courts system encourages and supports ADR and mediation. In the Magistrates Court, claims of \$10,000 or less can elect to have access to a less formal dispute resolution process where the main objective is to bring the parties to an acceptable settlement, generally without lawyers and with more privacy for parties. The Magistrates Court can order a pre-trial conference, listings conference or mediation before the dispute proceeds to trial.</p> <p>Pre-trial conferences are usually scheduled when an action is entered for trial. The purpose of such a conference is to allow the parties to exchange their views in a forum where what is said is 'off the record' and cannot be used in evidence at trial. If an action cannot be settled at the pre-trial conference, it will usually be adjourned to a listing conference, for the allocation of trial dates. The experience of the Magistrates Court is that such conferences lead to settlement in a high percentage of cases reducing the demand on Court resources and reducing the costs to the parties.</p> <p>In the District Court, less than 3% of civil actions commenced are finalised by the parties going to trial. While some actions are resolved through a party obtaining default judgment or summary judgment, most of the remainder are resolved by agreement between the parties. The Court operates an ADR program to facilitate the parties to actions in the Court settling their actions as soon as practicable after commencement.</p>	<p>http://www.magistratescourt.wa.gov.au/ www.districtcourt.wa.gov.au/ http://www.supremecourt.wa.gov.au/</p> <p>The figures provided refer to all civil cases heard by the Magistrates Court. The cases primarily relate to Restraining Order applications, Residential Tenancy disputes and Extraordinary Drivers Licence applications. These matters are dealt with within a short time span due to legislative requirements that determine 'immediate' finalisation of these types of cases.</p>	<p>The average cost per case in 2009-10 was \$272.</p> <p>Note: Financial reporting tools now only provide 'whole of courts' figures and cannot provide individual jurisdiction level figures.</p>
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