

Your Ref: Options Paper: Resolution of small business (business-to-business) disputes

Quote in reply: Franchising Law Committee & ADR Committee

30 June 2011

General Manager
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Dear Senator Sherry

OPTIONS PAPER: RESOLUTION OF SMALL BUSINESS (BUSINESS-TO-BUSINESS) DISPUTES

Thank you for the opportunity to provide comments on the Resolution of Small Business Disputes Options Paper.

This response has been compiled with the assistance of the Queensland Law Society Franchising Law Committee and ADR Committee who have a keen awareness of the issues affecting this area of law.

The Options Paper considers four possibilities for the resolution of small business disputes. The Society's commentary on the four options is considered below.

Option 1: National Information and Referral Service

The Society strongly supports implementing a centralised and dedicated national small business referral service to provide the community information and guidance on dispute resolution.

The Society recommends that the referral service be clear as to what areas of law and types of disputes it intends to canvass and also considers the following circumstances:

- How to avoid disputes;
- What to do when a dispute arises; and
- How to continue/maintain business relationships once a dispute has been identified or resolved.

In response to the Focus Questions on page 13 of the Paper, the Society considers:

- A new dedicated phone line and website should be established with reciprocal links between existing websites. The website is anticipated to be a centralised repository of factsheets, helpful hints, useful numbers and links to other websites so as to ensure parties there is one dedicated contact for obtaining information for small business dispute resolution processes.
- Small Businesses would be assisted in receiving factsheets and case examples in dispute resolution (both litigious and alternative dispute resolution) and should be categorised by practice area.
- A strong awareness campaign will certainly encourage small businesses to utilise this service.

Option 2: National Dispute Resolution Service

The Society agrees that small businesses would certainly benefit from having a national, centralised dispute resolution service that has:

- A dedicated website and phone line;
- Information and guidance on existing ADR services;
- A referral service to ADR providers; and
- A strong awareness campaign that could be promoted through existing government websites.

The Society does not consider that a separate mediation service established by the Commonwealth Government would be necessary in light of the numerous existing ADR services, the concern for duplication and the increased costs that would be required to establish this service.

Similar to the recommendation in Option 1, the Society considers that the National Dispute Resolution Service be clear as to what areas of law and types of disputes it intends to canvass. For example, how would franchising disputes be resolved?

Option 3: National Small Business Tribunal

The Society is concerned that a National Small Business Tribunal would add unnecessary cost and delay as well as being an unnecessary duplication of the state and territory dispute resolution Courts and Tribunals.

In relation to small business disputes involving franchising, the Society notes that parties to disputes under the Franchising Code of Conduct are encouraged to use mediation to assist in the resolution of those disputes. There is an existing Office of Franchising Mediation Advisor, to whom parties in dispute can use to request assistance in the appointment of a mediator. Mediation to resolve disputes initiated under Part 4 of the Code is compulsory. If a matter cannot be resolved at mediation then either of the parties' have rights to approach the courts for relief if they choose.

In Queensland, QCAT does not have jurisdiction to consider franchising disputes but it does have jurisdiction to consider Retail Shop Lease disputes. The Society has previously indicated its concerns with QCAT being used as a forum for resolution of franchising disputes in Qld.

With the new *Civil Dispute Resolution Act 2011* shortly to commence parties to proceedings in the federal magistrates court or federal court will need to show they have taken genuine steps to try to resolve the dispute or risk adverse costs orders. These genuine steps could be evidenced by following the Commonwealth's preference for mediation.

The options paper indicated that Option 3 favours an approach of conciliation (as opposed to mediation) leading to the matter being considered by the Tribunal. Whilst it is preferable to have a national forum to enable a consistent process for the determination of franchising disputes, there are concerns that stakeholders would be confused as to which forum to utilise when there is a combination of state and federal small business disputes (for example retail shop leasing and franchising.)

The Society is also concerned that Option 3 does not adequately define what Franchising Code of Conduct disputes are to be excluded from the operation of this option. For example is it any dispute that involves parties to a franchise agreement or is it simply limited to disputes between the parties involving an allegation of a breach of the Franchising Code of Conduct. This is not made clear in the options paper and it would appear on a cursory examination that the proposal is to not regulate any form of dispute involving retail leasing or franchising.

The Society does not support the implementation of a National Small Business Tribunal as currently drafted and recommends further consideration for improving existing federal forums to ensure expeditious and low cost resolution for parties, particularly parties to a franchise agreement. To that end, the Society would be pleased to be involved in further consultations on this issue.

Option 4: Small Business Advocate

The Society notes that the description of the “small business advocate” appears to be akin to a “small business commissioner,” however it is unclear how the office of the Small Business advocate is to operate, especially in conjunction with the states. As there is a concern for the duplication and/or confusion with the state equivalent commissioner/ombudsman, the Society does not recommend this course without further consideration as to how it would be co-ordinated throughout the states and territories.

Recommendations

The Society recommends that Options 1 and 2 be considered and developed further as the preferred alternative for small business dispute resolution, with special consideration for revising Option 3, as discussed above.

Thank you for the opportunity to provide comments and submissions on this Options Paper.

Please do not hesitate to contact either myself or have a member of your staff contact our DMC Manager Grace van Baarle on (07) 3842 5824 or g.vanbarrle@qls.com.au or our Policy Solicitor, Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au if you wish to discuss these concepts further.

Yours faithfully

Bruce Doyle
President