



Small Business Development Corporation

Submission to the Productivity Commission Inquiry Access to Justice Arrangements



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Development Corporation**

About the Small Business Development Corporation

The Small Business Development Corporation (“SBDC”) welcomes the opportunity to provide this submission to the Productivity Commission (“Commission”) Inquiry into Access to Justice Arrangements (“the Inquiry”).

The SBDC is an independent statutory authority of the Western Australian (“WA”) Government and was established to facilitate the development and growth of small businesses in this State.

The SBDC has been providing assistance to small business owners in WA for 30 years. In that time, the SBDC has gathered extensive knowledge regarding the issues facing small businesses and provides informed opinion on small business issues to industry and all tiers of government.

One of the SBDC’s key strategic objectives is to advocate for a fair, conducive and productive environment for small businesses in WA. The SBDC strives to achieve this by taking a leading role in influencing the policy and regulatory environment for small business. Another strategic objective of the SBDC is to ensure the best return on Government funds that are invested in the development of the small business sector. The SBDC develops the small business sector through the provision of education materials, workshops and tailored business and commercial tenancy advice, amongst other things. This advisory service assists small businesses to minimise their exposure to risk and therefore disputes.

In 2011, legislation passed through Parliament to introduce the role of the Small Business Commissioner (“SBC”) as the Chief Executive Officer of the SBDC. In addition to this role, an alternative dispute resolution (“ADR”) service was introduced to assist small businesses resolve their business-to-business or business-to-government disputes. The SBC, ADR service and advisory function of the SBDC will be discussed in greater detail throughout this submission.

In order to build up a comprehensive picture of WA’s small business sector, the SBDC has a multifaceted approach to gathering information. Statistical data about the sector is monitored from a variety of sources, including interactions with individual small businesses, as well as undertaking frequent opinion and other surveys of small business operators in WA.

The SBDC uses this information to inform evidence based policy development and advocacy for the benefit of the small business sector internally, as well as to influence other government agencies.

Relevance of the Inquiry to Small Business in WA

In an article in The West Australian on 25 October 2012, *“Supreme Court Chief Justice Wayne Martin said Australians could take pride in the country’s legal system but many lacked the financial and other resources needed to access the justice system ... [he] likened Australia’s legal system to a Rolls-Royce, arguing it is accessible only to big business, the very wealthy and a small group entitled to aid and was out of the reach of ordinary Australians”*.

Small businesses are made up of 'ordinary Australians' and are disadvantaged when accessing civil justice. This Inquiry gives small business advocates, such as the SBDC, an opportunity to highlight the numerous barriers that impede the sector's access to justice and make suggestions to improve the situation.

The Commission seeks suggestions on the areas it can add most value to when undertaking this Inquiry. Small businesses make a significant contribution to the community and economy. A focus on improving access to justice for the sector will not only be valuable for individual small business owners but will positively impact on the community and economy overall. Reducing the amount of time and money that small business owners devote to resolving their disputes will directly benefit the economy by allowing for the redirection of resources to growth activities, thereby increasing productivity. Furthermore, the social impact of business related disputes are high when they seriously and permanently damage important business relationships.

There are multiple avenues available to small businesses when attempting to access justice and the SBDC believes that the Commission should place importance on improving all these avenues. The avenues include preventative measures such as education and advice from Government and private services (e.g. legal services); access to ADR services and legal intervention by a Court or Tribunal. The SBDC recognises that all disputes are different and while some may be resolved through ADR, some require legal intervention due to their complexity and nature. For small business owners, it is important that disputes are resolved as quickly and fairly as possible to minimise any damage to business relationships.

The focus of the SBDC submission will be on how small businesses access justice, specifically when they experience a legal issue or dispute. The SBDC submission to the Inquiry will explore:

- 1) Characteristics of the small business operators that make them vulnerable to legal problems and impede their access to justice;
- 2) Experiences of WA small businesses owners who have been involved with disputes; and
- 3) Suggestions to minimise the incidence of legal problems and disputes within the small business sector, as well as improving access to justice for those who need it.

Small Business in Western Australia

Small business is defined by the *Small Business Development Corporation Act 1983* (WA) as a business which is owned and operated by an individual or by individuals in a partnership or by a proprietary company that has:

- A relatively small share of the market in which it competes;
- Is managed personally by the owner, owners or directors; and
- Is not a subsidiary of, or form part of, a larger business or enterprise.¹

The small business sector plays an important role in WA as an employer and income generator. Small businesses account for 95% (211,203) of all businesses in Western Australia² and employ 47.2% of the workforce across the nation.³ Figure One displays the breakdown of businesses in WA by size (employee size).

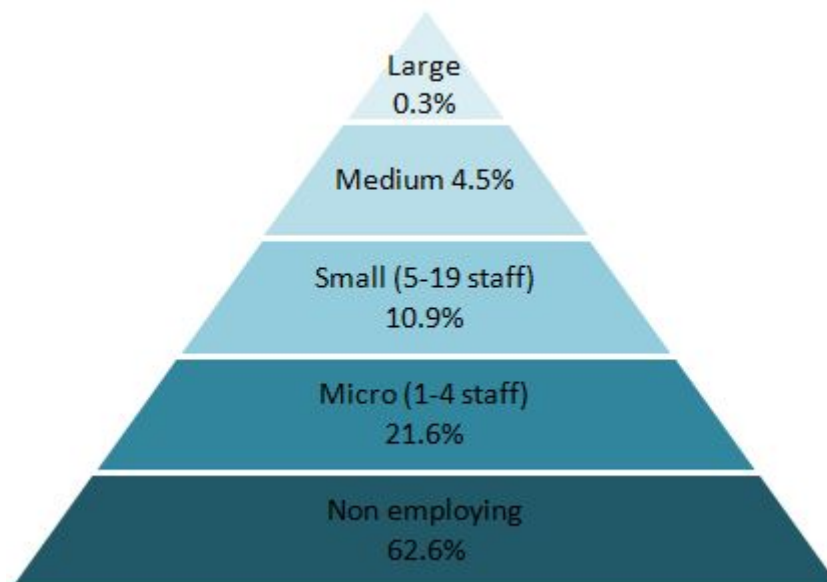


Figure One: The breakdown of businesses in Western Australia by size.

Small businesses can be found in every industry and sector of the WA economy, with the largest numbers in construction; professional, scientific and technical

¹ Section 3, *Small Business Development Corporation Act 1983*

² The Productivity Commission 2013, *Regulator Engagement with Small Business: Draft Report*, Government of Australia, Available from <http://www.pc.gov.au/projects/study/small-business/draft> [10 September 2013]

³ Department of Innovation, Industry, Science and Research 2011, *Key Statistics Australian Small Business*, Government of Australia, Available from <http://www.innovation.gov.au/SmallBusiness/KeyFacts/Documents/SmallBusinessPublication.pdf> [10 September 2013]

services; rental, hiring and real estate services; agriculture, forestry and fishing; and financial and insurance services.⁴

Small businesses exporters accounted for 42.5% of all goods exported in June 2011-12, exporting to China, Japan, the Republic of Korea, India and the United States of America.⁵

As these statistics show, the contribution of small businesses to the WA economy is significant and as such they are worthy of Government efforts to reduce any barriers to their productivity. An inability to access justice negatively and significantly impacts on the sector's productivity and therefore needs to be addressed.

Small business characteristics leading to vulnerability

In general, the barriers impeding a small business owner from accessing justice can relate to characteristics associated with them as:

1. Individuals (e.g. age, language); and
2. Small business owners (e.g. lack of time, money).

Australian Bureau of Statistics data is no longer available on the characteristics of small business operators, nor does the SBDC collect empirical data on the personal characteristics of our clients. However, it is the SBDC's experience that many small business owners share common characteristics that make them vulnerable to legal problems. These same characteristics also impede their ability to access justice when problems do arise. The Inquiry paper also identified some characteristics which lend themselves to vulnerability in the justice system. In the SBDC's experience, common characteristics increasing vulnerability to legal problems and impeding access to justice amongst small business owners include:

1. Language comprehension;
2. Cultural background;
3. Lack of skills - relevant to managing and running all aspects of a business; and
4. Lack of understanding - about regulatory and legal requirements relating to running a business, along with available dispute resolution avenues.

Aside from the personal characteristics that increase a small business owner's vulnerability to legal problems and impede access to justice, other factors and behaviours related to being in small business increase vulnerability.

As a collective, small businesses have a substantial impact on the West Australian community and economy. However, traditionally individual small businesses have

⁴ Australian Bureau of Statistics 2012, *ABS Cat. No. 8165.0 – Counts of Australian Businesses, including Entries and Exits, June 2008 to June 2012*

⁵ Australian Bureau of Statistics 2012, *ABS Cat. No. 5368.0.55.006 - Characteristics of Australian Exporters, 2011-12*

not gained power from their membership of a large group. Due to time and monetary constraints, small businesses owners tend to be inward focused as they devote their resources and efforts to running their core business activities.

Commonly reported experiences of small business owners making them vulnerable to legal issues/accessing justice, include a lack of:

- time to educate themselves on common business concepts;
- time to maintain currency in knowledge;
- money to invest in improving systems, agreements and develop best practice models; and
- time and money to pursue complaints.

Further, when an individual small business owner experiences a problem, such as a civil dispute, they do not tend to call on qualified outside sources for help, instead attempting to resolve the issue using their own resources and knowledge or that of non-qualified associates.

Thirty years of providing general and specialist business advice to WA small businesses has also provided the SBDC with the following insights:

1. Small business owners generally seek assistance from outside sources when they are already in trouble. It is rare for a small business owner to seek assistance to prevent issues from escalating;
2. Small business tenants and franchisees often do not read or understand their leases and franchise agreements, with many failing to properly realize the ramifications of terms and conditions they have signed off on; and
3. Small businesses are poorly equipped to establish and spend time securing business systems and reviewing business processes that would help prevent problems occurring.

The SBDC aims to reduce these risky behaviours amongst small business owners in WA by providing education and advice through the SBDC's advisory services and workshops. As a part of the SBDC's workshop program, business starters are encouraged to invest time and money in setting up robust business systems.

Minimising the engagement of small business in this behaviour is not easy. However, recognition of the fact that small businesses tend to engage in these behaviours is important if it is to be counteracted. The SBDC recommends that the Commission recognize the difficulties small business owners have accessing justice as a result of their characteristics and behaviours when recommending reforms to the civil dispute resolution system.

Areas in which small businesses experience problems

Small businesses are exposed to risk in almost every aspect of their operations. In the SBDC's experience, the commercial or retail lease is the major source of

disputes or issues for small business. In 2012/2013, the SBDC had 2,037 leasing enquiries, of which 33.8% were dispute related. The causes of these disputes for 2012/2013 include termination of tenancies, repair and maintenance, rent or rent review and operating expenses. Overall, a third of dispute related enquiries received by the SBDC were between landlords and tenants.

Of the non leasing related enquiries dealt with by the SBDC in 2012/2013 (n=2,056), a third (34.3%) were from small businesses in dispute with a supplier, 15.3% a client, 7.9%, a contractor and followed by 3.5% with a business partner.⁶

In the SBDC's experience, small businesses commonly report problems with contracts, franchise relationships, licensing and regulations and industrial relations.

Anecdotally, the SBDC is aware of increasing numbers of small businesses experiencing problems in the consumer protection arena. The introduction of the Australian Consumer Law ("ACL")⁷, has been positive in that it provides consumers with amplified protections and makes their rights and responsibilities clear. However, a little reported impact of the ACL is the way that it is being used by some consumers to coerce a small business to provide a remedy despite an ineligibility to do so. A small business will sometimes concede to the demands of a forceful consumer in order to protect the business' reputation amongst its customers.

The SBDC is also concerned that small businesses will experience difficulty as a result of the nationwide adoption of the personal property security register ("PPSR") which was introduced via the *Personal Property Security Act 2009 (Cth)*.

The SBDC has heard from a number of sources that small businesses are ill prepared for the ramifications of the change that the PPSR will have on security interest registrations. The introduction of the PPSR is beneficial to small business owners who comply with the registration system; however it can devastate those businesses that fail to comply properly, or at all. Of concern, anecdotal reports suggest that some businesses believe that they are compliant with the new regime and have successfully registered their security interest. However, many do not understand that errors in the registration process can void the registration and therefore result in the business losing their security interest in property.

The New South Wales case of *Maiden Civil v QES*⁸ is a good example where failure to register interests on the PPSR can lead to a business failing. In this case, Queensland Excavation Services (QES) lost its interest in equipment it had hired to Maiden. Maiden had granted a security interest over QES's equipment to a finance company and this finance company sought to rely on their interest once Maiden went into liquidation. As QES did not register their interest on the PPSR, they lost

⁶ Small Business Development Corporation 2013, Annual Report 2012-2013, available from the SBDC

⁷ Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*

⁸ [2013] NSWSC 852[1]

priority of interest in the property to the finance company. This is despite the Court finding that QES did have a legal interest in the equipment.

Experiences of small businesses with disputes

The Commission poses the question of how often groups with an unmet legal need experience substantial civil disputes and the nature of these disputes. In general small businesses frequently experience disputes that, when compared to other civil disputes, are low in value and would appear to be insignificant. However, in the SBDC's experience, these low value disputes or issues can have a significant and detrimental impact on the small business experiencing them. In some cases, what would appear to be a low value dispute or issue could cause a small business to fail.

In light of the above, the SBDC believes that the Commission should not focus only on the resolution of substantial civil disputes. Those with smaller disputes also need easier, quicker and cheaper access to the justice system to resolve disputes and problems.

In relation to the cost of dispute, the Commission should consider that disputes cost small businesses more than just money. There are also costs associated with time lost in the business to resolve disputes, especially where the owner is required to attend court if the dispute is pursued in this manner. Being involved in a dispute or legal issue can also detrimentally impact on a small business owner's personal and business relationships, physical and mental health and overall wellbeing.

The Commission asks how non-financial factors, such as psychological and physical stress caused by legal disputes, should be taken into account in this Inquiry. Whilst the SBDC is not in a position to make specific suggestions in relation to this point, it can provide some insight into the effect that disputes or issues have on all aspects of the small business owner's life.

The SBDC conducted a survey of a small sample⁹ of its clients to gain insight into small businesses' experience and opinions on accessing justice when things go wrong.

The SBDC's survey revealed that of those who said they had experienced a dispute; almost half reported that it was detrimental to their personal relationships. The vast majority of those also reported that the dispute was detrimental to their health, wellbeing and personal financial position.

Another non-financial factor that the Commission should be cognizant of is the impact disputes have on business relationships. Of the survey respondents who had

⁹ The SBDC conducted an online survey containing 13 questions. The results are not statistically significant and therefore numbers and percentages will not be reported, only general observations gleaned from the results.

experienced a dispute, the vast majority stated that the disputes were detrimental to not only the financial position of their business, but also their business relationships.

To preserve important business relationships, small businesses need disputes to be resolved quickly and fairly, which generally includes receiving accurate advice about their rights and obligations.

Small businesses as a group would benefit greatly from legal advice and assistance in resolving their disputes. However, in general small businesses cannot afford these services, and as a result, will attempt to resolve the dispute themselves or by using advice from other, potentially inappropriate, resources. There is also a perception amongst small business owners that these services are out of their reach financially. Therefore, even if small businesses could afford to access services, their perception of inaccessibility prevents them from doing so.

Under half of small business respondents who had a dispute sought legal advice. One of the main reasons given for not seeking legal advice when dealing with a dispute or issue was cost, as shown by the following quotes from survey respondents:

“Couldn’t afford the potential fees”

“Costs involved... \$500/hour”

“Very small business just does not have the resources or money to fight/pursue these kinds of problems, and as a result often get taken advantage of”

Furthermore, small businesses have to consider whether they will see a return on their investment in legal fees and whether this return is large enough to justify spending this money. This point ties in with the Commission’s query about whether the cost of accessing legal advice is proportionate to the issue in dispute. In the SBDC’s experience, the cost of seeking legal advice would be too great in relation to the value of the dispute for many small businesses. This idea is also reflected in the quotes from small business respondents below:

“Lawyers charge far too much and do not guarantee that they will achieve the desired result”

“Legal and time costs would outweigh any positive results”

Other factors that prevent small businesses seeking legal advice are time, a lack of suitable options due to location and a perception that the law will not be on their side:

“I don’t have the resources and I don’t feel that anyone will actually take on my issues”

“... [the] law seems to be on the side of disgruntled employees”

“the costs involved and if there is a good solicitor here, rural centre”

Some of the SBDC’s small business clients report that the requirement of most law firms for clients to deposit funds into the firm’s trust account prior to engagement acts as a major barrier to accessing their services. In some cases the small business will get a refund if their legal expenses are less than the initial deposit into the law firm’s trust account. However, small businesses can struggle to come up with this money initially and in most cases this would be a barrier to them actually seeking advice in the first place, regardless of the fact that they would get the money refunded.

For almost half of the small businesses surveyed by the SBDC, there was belief that it is not worth pursuing disputes or issues because of the cost and time involved. The majority of small businesses surveyed by the SBDC agreed that they would be required to divert valuable resources away from their business to pursue a dispute. Similarly, about a third of those surveyed believed that they would be unlikely to win if they did pursue a matter.

Of the small minority of small businesses surveyed who had been to a Court or a Tribunal to resolve their business-related disputes:

- half were represented by a lawyer;
- approximately half reported being confused by the forms and found the whole experience daunting and overwhelming; and
- most reported that the process was expensive relative to the value of the dispute and that they were not happy with the outcome.

As mentioned previously, small businesses are often the lesser resourced party to disputes and are therefore hampered in their efforts to seek justice by their limited bargaining power, resources and access to information. The SBDC is aware of reports of small businesses feeling that the other party to the dispute had more knowledge about the justice system and more money. This was highlighted by the following quote from a small business respondent to the SBDC’s survey:

“The financial imbalance between large (international) organisations and the average small business invariably mean that money plays the most important part. Constraint on finances results in an unfair judicial system in civil matters”

Having limited knowledge of the law and the legal system, as well as not being able to afford legal assistance, places small businesses in a vulnerable position when they experience disputes or legal problems. This vulnerability is compounded by the fact that small businesses may have no other option but to represent themselves in court based matters.

The Commission queries the ability of disadvantaged groups to self-represent in the justice system. Whilst some small businesses can do this effectively for minor matters with simple procedural rules, in general most small businesses would experience disadvantage due to the characteristics mentioned earlier in the submission. Furthermore, the fear and apprehension small business owners tend to have toward the Court system would dampen their ability to effectively represent themselves, particularly as the system overall, and Court environment in particular, is intimidating to them. Despite this vulnerability, small business owners are precluded from a number of legal protections and assistance due to the fact that they require assistance in a business capacity.

The SBDC has long advocated that small businesses receive the same protections as individuals under the Australian Consumer Law.¹⁰ The SBDC believes that small businesses are just as vulnerable as individual consumers as they too lack the knowledge of the law and the financial ability to pursue their rights.

A similar circumstance where small businesses are denied assistance, despite clearly having a need for it, is legal aid. Small businesses report being turned away when seeking assistance from Legal Aid, even though their knowledge and financial position is equivalent to that of an individual. An example of this situation is represented in the case study below of a recent SBDC client who could not afford private legal services and who was denied assistance from Legal Aid. Although this case study relates to a criminal charge, the concepts are transferrable to the civil system.

CASE STUDY – NO ASSISTANCE AVAILABLE

A small business owner was charged for an activity undertaken in the course of business. The small business owner was told he would be liable for his actions as an individual and in his capacity as a business owner. On behalf of the business, the owner faced a large monetary penalty. The small business owner, having not sought legal advice due to a lack of funds, pleaded guilty to the charge on behalf of the business. The Magistrate adjourned the case and instructed the business owner to seek legal advice prior to accepting his guilty plea. The small business owner approached Legal Aid WA for assistance but was denied help and referred instead to the SBDC. While the SBDC directed the small business owner to information about complying with the regulations when undertaking this activity in the future, it could not provide advice on his current charge as it is not able to give legal advice. In this case, a poorly resourced small business owner was in desperate need of legal advice but was not in a position to obtain it unless they came up with the financial resources to seek private legal advice.

¹⁰ As found in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*

The above case study provides an answer to the Commission's question about what course of action those who cannot afford legal services but are denied legal aid take – they either represent themselves (often poorly) or concede defeat.

Not only does self representation cause disadvantage to small businesses, but it has the potential to cause delays as judicial officers provide assistance and guidance throughout court proceedings to the self represented.

The SBDC's specialist advisers deal with small businesses experiencing disputes on a daily basis. Small businesses often ask for help completing forms and preparing their documents for Court. Unfortunately, the SBDC is limited in the assistance it can provide to small businesses in this regard. There have been a number of reports from clients who have been turned away from Court for having filled a form in incorrectly or filled out the wrong form altogether. In the 30 years of assisting small businesses in WA, the SBDC has identified patterns and drawn inferences about certain situations and institutions. Unfortunately, one of these inferences is that the civil court system is not user friendly for small business owners because of the forms required, lack of assistance by Court staff and procedural requirements.

Furthermore, the SBDC is aware of some occasions where a better resourced party uses their knowledge of the legal system (or that of their advisers) to take advantage of a small business, particularly by exploiting loopholes in legislation and by utilising delay tactics.

Improving Access to Justice for the Small Business Sector

The Commission is seeking suggestions for reforming the civil dispute resolution system, so as to generate the greatest benefits for the community. As discussed earlier in the submission, small businesses would benefit the most from a system that allowed for quick and fair resolution of business disputes and issues. To achieve this, the SBDC advocates for a system that comprehensively educates small businesses about their rights and obligations so as to minimise legal disputes and issues arising. Further, this system should then provide them with easy access to services when things do go wrong. The SBDC suggests a multifaceted approach to reform focusing on the following areas:

1. Prevention through education and advice

The Commission mentions building resilience and capabilities to help parties deal with routine and unexpected legal problems. The SBDC believes that the provision of comprehensive, relevant and accessible information and advice from wide variety of trusted sources would go some way in building the capability of small businesses in this regard. Furthermore, being able to access advice at the right time (e.g. prior to a contract being signed) will greatly assist small businesses to avoid future legal problems.

The SBDC recognizes that there are a multitude of resources available to small businesses in terms of education material and advice. The SBDC provides advisory services through which small business owners can seek information in person or over the telephone about all aspects of their business. Furthermore, the SBDC runs a regular workshop program for small businesses, the topics range from starting a business to understanding the financial aspects of managing a business. The SBDC does not collect information on the number and value of potential disputes averted as a result of the advice it provides. However, the SBDC consistently receives positive feedback about its services from its clients.

The SBDC also creates educational material on topics relevant to small business owners and presents this in such a way that it is relevant and useful to our clients. In writing this submission, the SBDC reviewed the legal information provided to the community from some government and non-government organisation's ("NGO") websites. Whilst the information on these websites is useful, often it is targeting a wide audience and as such the topics on which businesses require information are not well covered. Therefore, while there is information available for small businesses, it may not provide sufficient detail to comprehensively inform small businesses about their rights and responsibilities. As discussed above in relation to the introduction of the PPSR, a failure to fully comprehend their responsibilities can lead to devastating consequences for a small business.

In addition to being inadequate, some of the information provided to assist small businesses is also inaccessible to them. Small business owners are typically time poor and therefore cannot personally attend a workshop. In recognition of this fact, the SBDC has begun converting some of its workshop program to video format. This will increase the accessibility of the information for small business owners, as they will be able to view the videos online at a time and location convenient to them.

Having easily accessible and understandable information is vital to small business owners, particularly those who attempt to resolve problems themselves. Some small business owners may also need an incentive to seek out the relevant advice and education. Whilst the SBDC believes that small business starters should not have barriers placed in their way, it does believe that more starters should be encouraged to undertake business education prior to starting their business.

The SBDC's 'Business Basics' workshop provides business starters with information relevant to starting a business. This free workshop is delivered by the SBDC's experienced business advisers, runs for two hours and is accompanied by a practical starter's workbook. Small businesses would benefit from undertaking education such as Business Basics, as well as receiving more tailored legal education on topics relevant to operating a business. The SBDC is constantly reviewing its education material and improving its reach into the small business sector to improve understanding. However, as the SBDC does not provide legal advice to its clients, it

is recommended that the Commission investigate appropriate avenues or bodies to provide this tailored legal education for small businesses.

Education and advice can empower a small business owner and goes some way to leveling the playing field against larger corporations. The quote below, from a client of the SBDC, reiterates the idea that small business owners may be able to resolve relatively minor legal issues themselves if they are equipped with the right information and have confidence in their understanding and ability:

“If a person fails to pay me what is owed, I usually decide that I don’t want them as a customer, and take legal action through the Local Court - doing it myself saves a lot of money.”

2. Alternative service providers and methods to resolve disputes

Small business owners, as a cohort, benefit from alternative sources of advice and alternative means of resolving disputes. As mentioned previously, small business owners traditionally cannot afford to seek professional legal advice nor can they afford to pursue a dispute through the Court system.

The SBDC recommends that its clients seek advice and assistance from legally qualified professionals, as often the initial outlay will negate future costs from arising. Small business owners themselves recognize the importance of seeking legal advice, however, they are advocating for the provision of such advice at an affordable rate, as seen through the answers that some of the SBDC’s clients gave to the question – “what is the one thing that would help you resolve your disputes more effectively?”:

“Cheap legal advice without risk of cost blowouts, and guaranteed to be substantially less than the monetary value of the disputed amount”.

“Being able to seek a free consult with a lawyer with honest advice”

“Access to good quality legal advices at affordable rate during start of business and contracts signing”

“Being able to afford a lawyer.”

Some of the small business owners surveyed by the SBDC wanted free legal advice from a government agency. The SBDC does not advocate for the provision of legal advice for small businesses by a government agency, with the exception of providing eligible small businesses with Legal Aid (as discussed earlier in the submission). A government agency providing legal advice for all businesses is not in keeping with the National Competition Policy. However, the SBDC does see a benefit in investigating situations where advice and assistance is provided by non-legally

qualified professionals. The benefit being that the small business will still receive quality advice but at a reduced cost.

This is seen in areas such as conveyancing and property settlement, where this service is not solely the domain of legal professionals and has been adequately provided by other trained individuals such as conveyancers. One such area where small business owners would benefit from expert, but not necessarily legal, advice is the PPSR. As discussed earlier in the submission, compliance with the PPSR is relatively simple however an error in the registration process could lead to disastrous consequences. Whilst a small business owner does not necessarily require a lawyer to provide advice on this topic, they do need advice from a person with the relevant knowledge on how to undertake the process.

There may be other areas where a non-legally qualified person can provide assistance to small business owners on relatively minor and uncomplicated matters and the SBDC will continue to monitor these areas and feed this information back to relevant government bodies and inquiries.

Small business owners who completed the SBDC's survey agreed that the provision of quality advice from an alternative source but at a cheaper rate would be beneficial to them. When asked what the one thing was that would help them resolve their business disputes, small business owners said:

"Having access to [alternative non-court based] services that doesn't cost me a fortune"

"Access to a legal expert in competition and small business"

"More help in regards to legal problems at a fair price"

"[the provision of] templates for routine legal matters such as confidentiality disclosures, consultancy agreements, together with general indications where lawyers need to be consulted".

"An organisation that small business could get information free of charge to work out their rights before starting on a course of action"

"one on one advice personalized to my business, follow up communication after visit/advice"

Similarly, small business owners benefit greatly when there is an alternative, non-court based, avenue to resolve their disputes and issues. The Commission makes mention of improving the capacity of businesses to deal with disputes through conflict resolution education and informal complaint mechanisms offered by the Small Business Commissioners.

Small Business Commissioners are in place in Victoria, South Australia, New South Wales, and Western Australia; and there is also a Federal Small Business

Commissioner. ADR services are provided by each of the Small Business Commissioners and there is evidence that these services are making a difference to small businesses. In Victoria, 80% of all disputes received by the Office of the Small Business Commissioner since its establishment in 2003 were successfully settled.¹¹ As at the 30 June 2012 (three months after its inception) the Small Business Commissioner South Australia finalized 60 disputes, of these 85% were successfully resolved.¹²

The SBDC is an advocate of alternative dispute resolution as a beneficial alternative to resolving disputes in court and also provides its clients with an ADR service.

The SBDC's ADR service commenced on 26 March 2012 and provides a low-cost, non-litigious means of resolving business-to-business and business-to-government disputes, while preserving business relationships. This service is in addition to the SBDC's advisory services. The Small Business Commissioner WA and ADR service were introduced to level the playing field for small business operators who are often disadvantaged due to their limited bargaining power, information and resources.

Prior to the introduction of the Small Business Commissioner and ADR service, avenues for redress were not sufficiently accessible or responsive for small business in WA. By providing these services to small business in WA, the Small Business Commissioner and SBDC aims to resolve business disputes quickly, cheaply and with minimal formality, which in turn helps to preserve important business relationships.

The SBDC's ADR team handles a wide range of business disputes, including disputes arising from:

- Retail and commercial tenancy;
- Debt collection;
- Business to government;
- Contractual;
- Franchise;
- Intellectual property;
- Trade practices;
- Unfair market practices; and
- Professional and product liability.

The SBDC's ADR service begins with a case manager providing advice and assistance to parties to help them understand their rights and responsibilities. The case manager takes the parties through guided resolution, during which they attempt to help parties reach a resolution. If parties fail to reach agreement through guided

¹¹ The Victorian Small Business Commissioner 2012, Statistics. Available from <http://www.vsbcc.vic.gov.au/about-the-vsbc/statistics> [30 October 2013]

¹² Small Business Commissioner South Australia 2012, Annual Report 2011-12, available from http://www.sasbc.sa.gov.au/files/64_sbc_annual_report_2011-12_web_2.pdf

resolution with a case manager, they can choose to proceed to the next stage of dispute resolution within the SBDC's ADR service. This involves the voluntary participation in mediation, provided at a subsidized cost through a private mediator. The SBDC has developed a pool of independent and professional mediators to assist small businesses resolve their disputes without the need for legal intervention.

Feedback from small businesses that have accessed the SBDC's ADR service has been positive:

“Of all the government organizations I have approached throughout my more than ten years of trading in Western Australia, the SBDC has been the only one that has given me the most highly professional guidance in resolving business issues. In my view, the one thing that would not only help me as a small business operator to resolve disputes and problems, but also for my business to survive; are organizations like the SBDC which are driven by ethics rather than economics and that listen and give a voice to small enterprises.”

“On all levels the SBDC was exemplary. [Their] efficiency with the phone mediation, kept the process moving along. The forms to be filled out were comprehensive and yet not burdensome. The wonderfully reduced price for face to face mediation. The fact that we actually came to an agreement. Everyone I dealt with was professional and not defensive, condescending, judgmental. All qualities that would be easy to slip into. I personally felt heard and supported. I cannot talk high enough praise for all levels of the service provided by the SBDC, a truly wonderful and professional service.”

The Commission seeks opinion on which aspects of the civil dispute resolution system could be reformed to generate the greatest benefit to the community. The SBDC has firsthand experience of the benefit of ADR to small businesses, having provided this service for over a year. As such, the SBDC advocates for the expansion of ADR services across the community and not just for the small business sector. In this regard, the SBDC is advocating for the provision of a service that improves lesser resourced parties' access to justice. Furthermore, small business owners appear to be embracing alternative models of dispute resolution as a means of resolving their legal disputes.

These avenues are accepted as a valid alternative to providing cheaper and quicker resolution to business related disputes, whilst preserving important business relationships. One small business survey respondent stated that they do not use lawyers to resolve their dispute because they are *“using a mediation process, and if necessary following up with arbitration... has always proved the most cost effective path to a beneficial outcome”*.

The SBDC's ADR service provides small businesses with a cheaper and quicker means of resolving their dispute. As mentioned above, the mediation service is subsidised by the Government and therefore small businesses are accessing this service at a cost less than market value. Each party contributes \$125 towards the mediation session, which is much less than what they would pay to access private mediation or seek assistance from a legal professional. In this regard, it is clear that ADR services such as those provided by the SBDC can greatly address the cost pressures on small businesses with a business related dispute.

3. Alternative methods of accessing justice

As has been mentioned several times in this submission, small business owners are time poor and, struggle to take time away from the business. Therefore, if a small business owner was required to attend Court or an alternative arena to resolve a dispute, they would be greatly disadvantaged. In some cases, this would prevent a small business from seeking justice at all.

To increase accessibility to justice for small businesses, the SBDC recommends the expansion of the use of technology in the Court system. Small business owners would benefit greatly if they could make a virtual appearance at a hearing, as is sometimes practiced in the criminal justice system where prisoners can make their appearance via video conferencing.

Technological improvements by the Court system are already making courts and tribunals more accessible for small business owners, such as the ability to file documents online.

4. Improved data collection

Whilst the SBDC recognizes the collection and publication of data on the number, type and value of civil disputes is not a core function of the Courts or Tribunal, comprehensive data of this nature would provide useful insights to policy makers and could lead to improvements in court administration. The SBDC recommends increasing data collection and publication by the Magistrate, District and Supreme Courts, as well as the State Administrative Tribunal. Information about the characteristics of litigants, nature and size of disputes, number of self represented litigants, and outcomes can inform policy decisions and in this way provide vital insight into those seeking to improve overall access to justice arrangements.

Conclusion

Small businesses play a crucial role in the WA community and contribute in significant and varied ways to the economy. The SBDC recommends that the Commission take into account the needs and experiences of small business, as outlined in this submission, to improve access to justice arrangements for the small business sector.