



Australian Government

**Australian
Small Business
Commissioner**

20 May 2014

Access to Justice Arrangements
Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003

Dear Commissioners

Re: Access to Justice Arrangements

We thank you for the opportunity to provide some further comments to the Access to Justice Inquiry. We note our earlier submission and our continued focus below on small business disputes.

A broad framework

From our perspective, government has a role in improving the business environment, with two enduring core responsibilities, namely provision of information and justice.

Our Office has a credo that 'No small business should fail through lack of access to information'. The facilitation of access to information is a core responsibility of government. It is appropriate for government to commit resources to information and other supporting services, especially where the behaviour of businesses participating in a particular sector is regulated.

The second enduring core responsibility of government when intervening to regulate business is to provide an appropriate system of justice. Previously, provision of justice focussed on placing wrongdoers in prisons. Refinements and sophistications over time have developed various means of providing systems of justice, which are not confined to punishment of offences against the Crown but extend to finding justice for those in private conflicts. Alternative dispute resolution has emerged as an appropriate measure of according justice in business dealings.

We therefore agree with the emphasis of the draft report that links the provision of information with the issue of access to justice (for example, in your treatment of problems that are common to informal and formal aspects of access to justice). We also agree with the proposition that many small businesses can lack the understanding of the full nature of a legal problem and can be subject to an information imbalance depending on the nature of the dispute (page 180 of the draft report).

Alternative Dispute Resolution as a key feature of the system

As we set out in our earlier submission, alternative dispute resolution (ADR) is a key feature of the justice system for small business. In particular, ADR allows businesses to retain control of disputes and can provide for commercial outcomes. This means that there can be two winners in a dispute and, given the nature of an approach like mediation, the business relationships may be maintained.

We therefore commend your focus on ADR, including in its application for government such as via Draft Recommendation 8.2 (regarding government dispute resolution management plans) and draft Recommendation 8.3 (regarding increasing awareness of ADR via targeted methods). We also support broader proposals to increase the visibility and understanding of ADR, such as for the courts to use ADR in their processes and provide clear guidance about ADR options (such as via Draft Recommendations 8.1, 8.5 and 12.1).

Role of government

As we have already mentioned, we believe that government has a key role to play in terms of both information provision and access to justice. This is done in a range of ways that include, as the draft report notes, ombudsmen and small business commissioners.

We believe that these positions can play a vital role in the resolution of business disputes and, in particular, via triage/pre-ADR activities. Intervention early in disputes will often clarify issues and allow for their early resolution. Early intervention can also mean the difference between maintaining and losing commercial relationships. We therefore support the draft report's approach in this regard, such as Draft Finding 2.2 and Draft Recommendations 8.4 and 12.1.

We also agree with the proposition that positions such as ombudsmen and small business commissioners can provide leadership in dealing with systemic issues that lead to unnecessary disputes with government agencies (Draft Recommendation 9.3).

We also note the draft report comments on the behaviour of Government agencies as model litigants. In a similar context, our office is currently engaged in a project to encourage Government agencies to behave as a 'model business' when undertaking business activities. In our view, among other things, a model business would seek to resolve disputes at an early stage and through means alternative to litigation, for example by mediation.

If you would like us to clarify or expand on our comments above, please do not hesitate to contact me or my Deputy, Craig Latham

Yours sincerely

Mark Brennan
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