

**Response to the Competition Policy Review Draft Report
Victorian Small Business Commissioner**

This response focuses on the following comment and question posed in the draft report at Draft Recommendation 49 – Small business access to remedies:

“The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.

The Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA” (p.65)

The Draft Report also provides some commentary on the question above on pp 255-256, including the comment:

“ In general, the dispute resolution processes currently available to smaller businesses for competition law-related disputes do not meet their expectations. The Panel has sympathy with their frustrations and considers that development of alternative dispute resolution processes could go some way to addressing small business concerns with the competition landscape they operate in daily.” (p.255)

Victorian Small Business Commissioner – background, functions and scope

The main purpose of the *Small Business Commissioner Act 2003 (Vic)* (SBC Act) “is to establish the office of the Small Business Commissioner (VSBC) to enhance a competitive and fair operating environment for small business in Victoria.” (SBC Act s.1). The thirteen functions of the VSBC are spelt out in s5 of the SBC Act. Relevantly, these functions include:

“To facilitate and encourage the fair treatment of small businesses in their commercial dealings with other businesses in the marketplace and with public entities, public service bodies, Councils and non-profit organisations.” (s.5(2)(a))

“To receive and investigate complaints by small businesses regarding unfair market practices or commercial dealings, and provide alternative dispute resolution between the parties involved in the complaint.” (s.5(2)(c))

“To provide alternative dispute resolution to small businesses in disputes with other businesses and with public entities, public service bodies, Councils and non-profit organisations” (s.5 (2)(da)

The predominant activity of the VSBC today is providing alternative dispute resolution (ADR) services, primarily mediation services, for business-to-business disputes. Some State laws¹ require business-to-business disputes to proceed to the VSBC for attempted resolution before they can be litigated. However, other disputes not falling under these three legislative heads can also be provided with ADR services by the VSBC under the SBC Act. These disputes are wide ranging in scope, context, complexity and value. They include disputes relating to any type of commercial arrangement between businesses², such as supply chain, services, franchising, non-retail leases (property and equipment), distribution and licensing, intellectual property and so on. The ADR services also apply to claims of unfair market practices.

¹ *Retail Leases Act 2003; Owner Drivers and Forestry Contractors Act 2005; Farm Debt Mediation Act 2011.*

² And business-to-government and business to non-profit entity disputes, although these are a very minor percentage of matters handled by the VSBC.

Over 1,500 dispute applications for assistance were received by the VSBC in 2013-14. The average growth rate in dispute applications since 2003 has been around 4-5% per annum. The average amount in dispute is around \$100,000, and the median over \$10,000. Dispute claims exceeding \$1m are not uncommon.

In 2013-14, the VSBC resolved 27% of disputes through early intervention with the parties – providing information, and where appropriate using shuttle negotiation to assist the parties in the resolution of their dispute. Of matters that proceeded to mediation, an 83% settlement rate - binding terms of settlement signed by the parties - was achieved (across all areas).

The VSBC has no powers to compel a party to engage with it. However, there are potential implications should a party unreasonably refuse to engage in ADR, although these implications vary across the five pieces of legislation administered³.

Further, the VSBC does not determine a dispute. Its ADR service assists parties to come to their own settlement terms.

Customer feedback on VSBC services rates very highly. Satisfaction with mediation services in 2013-14 exceeded 93%, regardless of whether the party was applicant or respondent. A similar rate of customer satisfaction is achieved when matters are resolved prior to mediation.

The Draft Report comments on Small Business Commissioners in WA, SA and NSW. All were established (in the past three years) based on the perceived successes since 2003 of the VSBC assisting businesses resolve their commercial disputes, and keeping them out of litigation.

Comments on specific issues raised in the Draft Report

- 1. The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.*

All four State Small Business Commissioners and the Australian Small Business Commissioner meet quarterly. The Deputy Chair (Small Business) of the ACCC is a regular attendee at these meetings, often with other senior officers of the ACCC. When the VSBC was the only (State) Small Business Commissioner, regular meetings between the VSBC and the ACCC occurred.

All Small Business Commissioners (or their representatives) attend the ACCCs two consultation forums (Small Business; Franchising) held twice yearly.

There has been and continues to be a very strong working relationship between the Small Business Commissioners and the ACCC, both formally and informally. Referral protocols have also been executed. While the VSBC does not capture data on the source of referrals for phone calls received, call centre operators advise that there has been a noticeable increase in the past twelve months at least of callers saying they were referred to the VSBC by the ACCC.

In summary, the VSBC experience is that there is an excellent working relationship with the ACCC, and the ACCC is actively referring callers in Victoria to the VSBC for ADR services where it considers such services may be appropriate.

³ In addition to the four Acts noted above, the VSBC also has an ADR role for taxi disputes between driver and operator under the *Transport (Compliance and Miscellaneous) Act 1983 (Vic)*

2. *The Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA*

The VSBC provides an ADR service for a broad range of business disputes, covering 'commercial dealings' and 'unfair market practices'. Neither term is defined in the SBC Act, and the VSBC takes the broadest view of their meaning.

The Panel's question requires some consideration of what small business matters are covered by the CCA. Firstly, neither the SBC Act (nor any of the other four Acts under which the VSBC provides ADR services) defines 'small business', nor does an application need to be lodged by the smaller business. The aim is to provide a neutral, fair and confidential environment to enable a facilitated resolution of a dispute between businesses and keep them out of litigation.

Secondly, the VSBC deals with a range of disputes which can be considered matters covered by the CCA. Examples include:

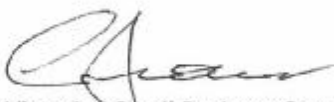
- Claims of misleading and deceptive conduct;
- Claims of unconscionable conduct;
- Claims of abuse of market power;
- Claims of unfair application of regulations

The nature of the ADR services provided by the VSBC is such that, where matters settle, there is no determination of whether the claims were or were not valid. Rather, terms of settlement will specify amounts payable or other steps to be taken as full and final settlement of the dispute. The strength of the claims, however, will be tested indirectly in the process, as the alternative to settling a matter at mediation is to run the litigation gauntlet. The merits of each party's case needs to be weighed up against the likely cost, time, emotion and distraction of litigation.

In summary, the VSBC (and Small Business Commissioners in WA, SA and NSW) provides a successful and highly rated ADR service for a broad range of business disputes, including matters covered by the CCA. Based on current services provided, however, the VSBC does not make determinations on disputes. There may be some types of CCA-related disputes which require a clear decision, or where a negotiated, pragmatic commercial outcome agreed between the parties is not possible or appropriate. However, that is what the civil justice system is designed to deal with.

3. *In general, the dispute resolution processes currently available to smaller businesses for competition law-related disputes do not meet their expectations. The Panel has sympathy with their frustrations and considers that development of alternative dispute resolution processes could go some way to addressing small business concerns with the competition landscape they operate in daily."*

The VSBC deals successfully with many CCA-related disputes, as noted above, with very high customer satisfaction rates for the services provided. If there are specific categories of CCA-related disputes for which ADR offered by the Small Business Commissioners is not appropriate, and the civil justice system is not considered an accessible solution for small businesses, these need to be clearly identified and their requirements understood to properly inform any conclusions about the suitability of existing or potentially new institutions or programs to address these needs.



Victorian Small Business Commissioner
14 October 2014