



Australian Government

**Australian
Small Business
Commissioner**

11 November 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Re: Competition Policy Review Draft Report

I am writing to provide feedback on the Draft Report into the Competition Policy Review (the Report). This feedback is in addition to our earlier submission on the Review. While there are many aspects of competition policy that impacts small business, our feedback on the Report is largely focused on Chapter 5, and more particularly access to dispute resolution mechanisms.

Firstly, I congratulate the Panel for the work completed to date. From a small business and family enterprise perspective, I am also encouraged by the level of consultation undertaken by the Panel and Secretariat.

It is the view of this Office that when it comes to intervention to regulate business, there are two enduring core responsibilities for government, namely education and justice.

It is a fundamental responsibility of government to inform and educate small business about laws and regulations to help them understand their rights and responsibilities. Informing the business community of any changes to the competition laws, and educating them to comply, will be an important aspect for the Government to consider once the Review is complete.

The second core responsibility of government is to provide an appropriate system of justice. Speedy, inexpensive resolution of disputes and fair dealings are crucial for business efficacy. This goes to Draft Recommendation 49:

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.

Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

Alternative Dispute Resolution generally

Alternative dispute resolution (ADR) mechanisms that operate with speed, at low cost, informally and collaboratively are generally of greater benefit to small business—principally because they facilitate parties continuing their commercial relationships. The focus of ADR is on resolving disputes as they occur. The role of early intervention in resolving issues should not be

underestimated. Intervening early before a dispute reaches a toxic stage can allow for the commercial relationship to continue, and in our experience, possibly be enhanced.

Within ADR, mediation has emerged as an appropriate measure of according justice in business and commercial dealings and has been used effectively by the state-based small business commissioners for a number of years. Mediation allows for a dose of commercial reality and can provide the flexibility to devise outcomes or solutions that best suit the individual and the business.

In our experience, many disputes arise from relatively minor irritations, but they can lead to significant breakdowns in business relationships. These often occur when one party acts in an unconscionable or unacceptable manner and they can be easily resolved through ADR processes, rather than through a more formal legal avenue.

Competition disputes

There are a number of issues to be considered in determining whether there should be a specific dispute resolution scheme for small business for matters covered by the *Competition and Consumer Act 2010*.

A critical question to answer is why does small business approach the ACCC for assistance in resolving complaints or disputes that are not true competition matters? In our view, this is primarily due to two reasons:

1. a lack of awareness of existing dispute resolution mechanisms; and
2. uncertainty concerning the law and the role and responsibilities of the ACCC.

Lack of awareness of existing dispute resolution mechanisms

In 2010, a survey conducted for the Industry Department¹ indicated that despite the wide range of dispute resolution services available, small businesses are generally not even aware of existing services. This includes low cost and free services. They are consequently also unaware of the relative costs or suitability of each mechanism for different types of disputes.

These existing low cost services include the Office of the Franchising Mediation Adviser (OFMA), the services of the state-based small business commissioners and the proposed mediation service of the Small Business and Family Enterprise Ombudsman (SBFEO). An additional, separate service for the *Competition and Consumer Act* would likely duplicate these services.²

In response to the issue of a lack of awareness of ADR services, our Office worked with states and territories to develop an online information and referral tool, *Dispute Support*.³ The tool helps small businesses in a dispute to get the information that they need. Dispute Support makes it easy and quick for small businesses to find the most appropriate low cost dispute resolution service for their needs. It also provides information to better understand and manage disputes and provides tips to avoid disputes in the future.

Dispute Support can be utilised by the ACCC to assist in connecting small businesses to the most appropriate dispute resolution mechanism where it considers complaints have merit but are not a priority for public enforcement through its agency.

¹ <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2010/sml-bus>

² Given that the legislation for the SBFEO is yet to be introduced, the full extent of possible overlap is unclear.

³ <http://www.asbc.gov.au/disputesupport>

Uncertainty concerning the law and the role and responsibilities of the ACCC

Competition policy and industry codes should allow disputing parties to be able to access a justice system to resolve their issues quickly, efficiently and in a cost effective manner. This should be accomplished without having to bring a dispute or complaint to the attention of the ACCC to undertake formal investigative processes that can require lengthy processes that do not guarantee that the dispute will be resolved.

However, when it comes to assessing and investigating small business complaints against unfair market practices to determine whether there has been a breach of the law—this is a role poorly suited to a dispute resolution service. This is best dealt with by entities such as the ACCC and the state fair trading bodies that have expertise in this field. If a particular matter is then deemed to be better dealt with by ADR, it could be referred to the most appropriate service using *Dispute Support*.

If you would like to discuss this letter in further detail please do not hesitate to contact either myself or my Deputy, Dr Craig Latham, who can be contacted on 02 6263 1506.

Yours sincerely

A handwritten signature in black ink that reads "Mark Brennan". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

Mark Brennan
Australian Small Business Commissioner
www.asbc.gov.au