NADRAC
NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL

Submission

To

Senate Economics Legislation Committee

From

National Alternative Dispute Resolution Advisory Council

Small Business Commissioner Bill 2013

1. NADRAC thanks the Committee for and accepts the invitation to make a Submission on the *Small Business Commissioner Bill 2013*.

2. NADRAC is an Advisory Council to the Attorney General on matters relating to any form of dispute resolution www.nadrac.gov.au/Pages/default.aspx.

3. The Bill follows work done on the substantial problems of small business dispute resolution. For example, the Industry and Small Business Policy Division of the Department of Innovation, Industry, Science and Research commissioned research from ORIMA Research in 2010. ORIMA Research produced a report "Small Business Dispute Resolution" dated June 2010. It was followed by a Departmental Options Paper "Resolution of Small Business Disputes" May 2011. NADRAC subsequently made a submission in response to the Options Paper 6 July 2011.

4. The Bill appears to respond to small business issues including some aspects of dispute resolution. NADRAC now accepts the invitation to make submissions on that aspect of the Bill.

Small Business Support

5. NADRAC notes that the Bill enhances, within constitutional limits, the Small Business Office currently in existence with a view in general terms to:

   (a) Recognising the important role of Small Business in the economy;

(b) Assisting with the difficulties confronted by smaller players in the market place;

(c) Recognising and making provision for complaint and action in respect of small business engaging with Government;

(d) Ensuring a fairer market place through monitoring, investigation and reporting, encouraging dispute resolution in respect of complaints against Government agencies.

6. The Bill complements similar legislative arrangements in Victoria, Western Australia and South Australia. The New South Wales small business office bears many similarities but without the same legislative framework. In each of the State arrangements (as in this Bill), there is a focus on the problems of small business involved with Government, on a fairer market place for small business, on fair trading issues and market place conduct. A distinct difference is the focus in the State arrangements on the provision of assistance for commercial business-to-business disputes.

7. NADRAC notes in particular, the more confined role of the Small Business Commissioner in the Bill in the area of business-to-business disputes (see section 8). It is a feature of the State small business offices that in each case while market place fairness and business with Government entities has an important role, it is the state small business offices which currently provide dispute resolution services in business-to-business commercial disputes involving small business. The Victorian Office of the Small Business Commissioner for example emphasizes on its website that a large area of work and growth is the provision of dispute resolution services for ordinary commercial disputes involving small business.

8. The dispute resolution problems for small business are a well recognized problem. Much has been done in the field and the Bill advances that work. A persisting problem however, lies in the difficulties for small business of achieving a commercial outcome by litigating disputes. The Options Paper of May 2011 set out some of the considerations involved in the provision of small business dispute resolution services at Commonwealth level. Each of the 4 options considered in the paper recognized that small dispute resolution was a high priority.

9. A summary of the four options for the Commonwealth is;

   a. establish a small business dispute referral service that provides information and guidance;

   b. establish a small business dispute referral service that provides information and guidance on dispute resolution and where there is a service gap for small businesses the Australian Government will establish a mediation service.

c. Create a legislated National Small Business Tribunal…offering conciliation and reviews of conciliation outcomes
d. Establish a national small business advocate which incorporates a dispute resolution function for education, early intervention and mediation for small business (business-to-business) disputes.

The Approach in the Bill

10. The scheme in the Bill uses some of a number of these features. It establishes a research and arguably a public advocate role. It seeks to avoid duplication of state with Commonwealth dispute resolution services; it provides some scope for dispute resolution in respect of business with government (although it is labeled the problem as one of "complaint" rather than dispute). However it provides little by way of a business education or information function and none in respect of business-to-business disputes except through State bodies who agree beforehand to allow that contact. NADRAC submits that avoidance of duplication should not allow a gap to form in responding to the principle small business problem; namely, accessing commercially viable, dispute resolution alternatives to litigation.

11. Set out below is a submission which in summary encourages an express widening of the role of the Small Business Commissioner to include some facilitation of dispute resolution but without duplication and where sought by parties involving a small business always subject to the same categories set out in s. 8(2) of the Bill.

12. NADRAC notes that the Bill does not distinguish among the categories:

(a) Complaints against a Commonwealth entity;
(b) Commercial dispute with a Commonwealth entity;
(c) Commercial dispute with another business entity failing within section 8(2);
(d) A complaint about market place conduct.

13. Different as the categories might be for other purposes, NADRAC agrees -- with one reservation -- that for the purposes of resolving a dispute or complaint there is no advantage in a more elaborate categorization or in different treatment of each within the Bill. The same array of resolution techniques is available whether the dispute is in the form of a complaint about a government agency on the one hand or a disagreement with another party on the other hand.

14. The reservation concerns the nature of dispute. Generally, dispute is perceived to be a normal and healthy result of the activities of entities with crossed, conflicting, competing or uneven interests. Such disputes are normally resolved on a day-to-day basis by discussion among the parties. A complaint on the other hand, usually refers

to the action taken to address perceived wrongdoing. NADRAC draws attention to possible cultural consequences for government of routinely categorizing normal commercial dispute as involving wrongdoing by government. There may be room for a complaint function against government agencies as well as a dispute function and the resolution may use the same techniques but the undesirable outcome can be avoided by using the words dispute or complaint.

15. The principle submission of NADRAC concerning the scheme in the Bill, is that a dispute resolution function even if only by provision of a list of service providers or a power of referral of those in dispute to a State body, neess to be accorded to the Commissioner in express terms.

<u>The Dispute Resolution Functions in the Bill (section 8)</u>

16. Dispute resolution in the Bill currently seems to be confined to two categories:

    (a) Complaints against Commonwealth agencies;
    (b) Facilitation of *"fair treatment of Small Business in their commercial arrangement with other businesses"* (section 8(1)(d)).

17. Section 8(1)(e) seems to assume that apart from a section 8(1)(d) situation provision of a dispute resolution service might be undertaken by the State Small Business Commissions and Offices limiting the Commonwealth Commissioner to the provision of such advice and assistance as may be allowed by the State bodies through agreement in respect of a dispute that has national ramifications.

18. Section 8(1)(d) is of course a sound general goal but NADRAC submits that it is an inappropriate platform for the provision of dispute resolution services for parties in dispute. The section concerns the elimination of unfairness to one type of party (Small Business) presumably caused by either market inequity or non-small businesses. While the section might reasonably assume unfairness by some large commercial entities it is not a working presumption from which the neutrality or detachment of dispute resolution techniques could operate. Another section not currently in the Bill would be required to achieve that end.

19. It must be said that the Bill provides no real role for facilitation of dispute resolution of the ordinary commercial disputes of s.8(2) disputants, by the Small Business Commissioner. If that limitation was not intended NADRAC recommends an amendment to section 8(1) to include an additional power in the following terms, "*subject to subsection (2) to facilitate the provision of dispute resolution services*

including mediation, conciliation or such other resolution technique as may be sought by a small business in dispute with another business".

20. If it was not intended to enable the Small Business Commissioner to facilitate resolution of business-to-business disputes, NADRAC assumes that the reasons behind that approach may include avoidance of action beyond the Commonwealth role, the avoidance of constitutional challenge in individual cases and the avoidance of duplication.

21. The Bill at present confines the Small Business Commissioner role to:

    (a) Small Business with Government relations;
    (b) Research;
    (c) Interagency and inter-government cooperation.

    In short a major problem confronting small business is not addressed even though the Bill appears to create a Commission for small business.

22. NADRAC acknowledges the importance of the matters listed (a) to (c) above but submits that they can all be achieved while still encouraging the greater business-to-business dispute resolution activities common among the State Small Business Officers. The following reasons are given for enabling the Small Business Commissioner specific power to at least facilitate resolution of business-to-business:

    1) Facilitation can be a low cost, low level of assistance requiring only a list of services and a power to refer.

    2) A dispute resolution service of some kind would be expected by small business from a small business commission.

    3) One of the more common problems for small business is the risk, cost and time of litigating against a large entity. The Courts have taken some steps to limit those problems but dispute resolution techniques should be encouraged as a first step to avoid litigation where possible;

    4) When litigation does occur it tends to terminate relations between small business and its disputant. Dispute resolution techniques can resolve the dispute and preserve the relationship. They are particularly powerful tools in mid-contractual disputes;

    5) Some State bodies offer excellent business dispute resolution services which could be used by disputants falling within section 8(2) however, a

Commonwealth Office of a Small Business Commissioner has the potential to establish its own group of mediators and dispute resolution specialists with knowledge and expertise more suitable for s.8(2) disputants. Disputes that are interstate or involve financial and trading or foreign corporations are frequently of higher value than those of a State domestic nature and would require dispute resolution services tailored to those needs;

6) The experience of the Office of the Victorian Small Business Commissioner is that commercial disputes are a growing area of the work of that Office and its work is increasing by 11% annually and has done since 2003;

7) It is the experience of dispute resolution practitioners as well as litigators (bearing in mind that most cases commenced in Court settle before hearing), that parties are likely to resolve once they engage a venue and other assistance is provided. The facilitation of dispute resolution services is inherently likely to be successful in resolving dispute at an early stage ;

8) The Small Business Commissioner is unlikely to achieve the leverage necessary to trigger a section 8(1)(e) agreement or have advice and assistance (beyond resources) accepted, unless the Office has its own history of managing dispute resolution services.

Conclusion

23. NADRAC submits:

(a) That the Bill and section 8(1) specifically, should but does not sufficiently enable the Small Business Commissioner to address dispute resolution between businesses;
(b) Section 8(1)(d) is an unsuitable platform for enabling dispute resolution facilitation even with government; another subsection in neutral terms (as suggested above), would be required;
(c) NADRAC submits that there is a strong case for enabling and encouraging the Small Business Commissioner to facilitate business-to-business disputes.

Mr Jeremy Gormly SC

Chair