Australian Government

Australian Small Business and Family Enterprise Ombudsman

Access to Justice Report
November 2020

Contact

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Foreword

This year has been one of the hardest in living memory.

We started in drought and bushfire and, as Australia's struggling small and family businesses began to emerge, we were struck by COVID-19. How we view and work in the world has been totally reshaped.

All small businesses have suffered through necessary lock-downs, and reimposed lock-downs to deal with new outbreaks. Cafes and restaurants have turned away hungry customers, artists and musicians have not performed to adoring fans, and the myriad of tourism industries that showcase Australia to the world have been decimated.

During this upheaval, Government has stepped in to help preserve our small businesses. But, there is so much more that we need to do for them – to give them a fair go, to help them continue to be competitive, and to emerge healthy and equipped to take on the world. This is a time when small business needs its commercial relationships more than ever. This is a time when all of Australia needs our small businesses to work together in healthy relationships. But this is also a time of unprecedented hardship and when disputes inevitably emerge.

Our previous work on small business access to justice pinpointed the immense difficulty that small and family businesses have in resolving their disputes. Both disputes and commercial relationships are often abandoned due to the cost and stress of trying to fix them. Commercial disputes are very common and devastating when not handled correctly. For a small business, current formal legal channels to try to resolve disputes are simply not an option.

When disputes emerge – whether over leases, supplies, payments or finances – timely and cost effective dispute resolution is critical. Dispute resolution though mediation, conciliation and arbitration are able to be applied quickly and at low cost – this is the best opportunity to preserve commercial relationships. Litigation simply kills businesses and their relationships.

We need dispute resolution channels to be less formal, and more timely and cost effective – channels that are tailored for small business and supportive of personal wellbeing through what is inevitably a stressful time. We need to properly tackle poor contracting terms imposed on small business and the unfair business practices that serve to weaken them. Alongside this, we need better formal dispute resolution for when businesses just can't resolve a dispute between themselves. These formal channels need to be re-designed in smart ways that do not expose small business to the vagaries and costs of the current judicial system.

In these times of unprecedented stress on small business owners, it has never been more important to ensure that small and family business can access justice in a timely and cost effective way.

Kate Carnell
Australian Small Business and Family Enterprise Ombudsman

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Finding: Contracting practice has not kept pace with best practice approaches to avoiding disputes and dispute resolution. Despite Unfair Contract Terms legislation being enacted for several years, these terms continue to be widespread and do not cover the critical issue of unfair practices. With the courts adopting a narrow view of the common law principle of unconscionable conduct and with no statutory protection, small businesses are left wide open to unfair practices with no remedy.

Outcome A

The Australian Small Business and Family Enterprise Ombudsman will produce a best practice guide to dispute resolution for inclusion in small business contracts that includes:

a. the requirement to act in good faith, including in proactively undertaking dispute resolution.
b. raising disputes and seeking to resolve them between themselves at first instance.
c. where disputes are not resolved between the parties themselves, engage in alternative dispute resolution, including mediation and arbitration.

Recommendation 1

Unfair Contract Terms legislation should be amended to:

a. apply to all standard form contracts with a small business (regardless of value and including those with Government) where the small business has either less than 100 employees or $10 million annual turnover;
b. pursuant to (c), make unfair contract terms void, rather than voidable, in any and all versions of the applicable standard form contract, with substantial penalties and compensation payments for those terms which are deemed unfair; and
c. for the purposes of (b) and alongside the existing court and tribunal jurisdiction over the legislation, the ACCC or ASIC (for financial matters) should be empowered to make findings of unfair contract terms, levy civil penalties and ensure action, with their decisions subject to appeal to the Administrative Appeals Tribunal.

Outcome B

The Australian Small Business and Family Enterprise Ombudsman will as a matter of urgency investigate the best approach to eliminate unfair practices that may occur even where otherwise fair terms are used, including whether failure to have a dispute resolution clause constitutes an unfair business practice.

Promoting alternative dispute resolution

Finding: Disputes are best resolved where the parties involved can reach resolution through a non-judicial process. Codes of Conduct provide industries with the opportunity to develop and enforce non-legal but formal dispute resolution processes which are timely and low cost.

Recommendation 2

All Codes of Conduct, whether voluntary or mandatory, should have a clear and comprehensive dispute resolution process, modelled on the ASBFEO best practice guide, that includes:

a. recognition of alternative dispute resolution frameworks.

b. access to determinative processes such as arbitration (in addition to mediation and other relevant forms of alternative dispute resolution).
c. a good faith requirement modelled on that within the Dairy Code.

Recommendation 3

The Australian Stock Exchange (ASX) should produce an appendix to its listing rules to provide that under Listing Rule 12.5, a company must have, and publish the details of, non-judicial internal and external dispute resolution processes to satisfy the requirement that the company has an 'appropriate structure and operation'. Further, when the ASX next revises its "Corporate Governance Principles and Recommendations", a new recommendation under Principle 3 should be introduced which states that:

"A listed entity should:

a. have and disclose a non-judicial dispute resolution process; and
b. include in its annual report a summary of disputes in the previous financial year."

Providing easier access to determinative dispute resolution

Finding: State Small Business Commissioners and Civil and Administrative Tribunals (alongside the Australian Small Business and Family Enterprise Ombudsman) offer critical services to help small business manage disputes and access alternative dispute resolution. Although alternative dispute resolution resolves the vast majority of disputes, there is no cost-effective, timely, and binding dispute resolution process where it does not.

Recommendation 4

Access to existing determinative dispute resolution channels should be improved:

a. Facilitate the Australian Small Business and Family Enterprise Ombudsman arranging voluntary, binding arbitration, alongside its current mediation referral system by:
    - Amending the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), such that the Ombudsman's powers to refer a dispute to alternative dispute resolution processes includes the power to refer to voluntary arbitration where matters are not already afforded arbitration through Codes of Conduct.
    - The Ombudsman would act as concierge for escalation to voluntary small business dispute arbitration, where the Ombudsman maintains a list of suitably qualified arbitrators familiar with small business matters and able to provide arbitration at a low cost.
    - Although mediation and other non-determinative forms of alternative dispute resolution should continue to be the default, escalation of disputes (and unresolved parts of disputes) to arbitration would be used for matters where mediation or other non-determinative resolution is not suitable.
    - ASBFEO would promote the use of model rules for arbitration, which can be altered by the participants as required.
    - Parties involved in the dispute would voluntarily agree whether or not to undertake binding arbitration with the cost of that process generally being shared.

b. The Federal Government should propose standard approaches, to be agreed through the National Cabinet, which will bring the current system of State and Territory-based Civil and Administrative Tribunals into common agreement such that the value of any dispute involving a small business that can be heard will have a

value of up to at least $100,000 (with values above those at the state and territory levels being heard by the Federal Circuit Court). It should also include agreed standard timeframes to expedite dispute resolution.

Recommendation 5

A Federal Small Business Claims List (the List) should be formed as part of the Federal Circuit Court to hear matters between businesses which do not fall within the current state or territory tribunal framework, where at least one of the parties is a small business, and where the value of the dispute is up to $5 million (ie. damages for the List would be capped at $5 million).

a. In keeping with Constitutional limitations, the jurisdiction should apply where one of the parties is a constitutional corporation, or the matter involves the course of trade of commerce between Australia or places outside Australia or among the States/Territories or involves insurance, banking, telecommunications, or copyright, patents, designs or trademarks, or involves a Territory business.

b. The List should use flexible approaches and aim to resolve matters within 60 days of the lodgement of a matter, provided any small business involved does not request an extension. This may include mediation where alternative dispute resolution has not already been undertaken.

c. The List should include the ability for a small business to apply for a no adverse costs order.

d. The Australian Small Business and Family Enterprise Ombudsman should provide a triage service for small businesses contemplating the use of the List, prior to lodgement of action within the List, to receive subsidised initial advice from a relevant professional.

e. The List should receive sufficient additional funding to ensure that the 60 day timeline is maintained and use online systems, including for alternative dispute resolution options, with lodgement fees kept to a minimal level for small business applicants.

Supporting the wellbeing of small business owners

Finding: Disputes place significant additional stress on small business owners, especially where they are not resolved with in a timely way. These additional stresses impact the normal activities of business owners and are an impediment to resolving disputes.

Recommendation 6

The funding announced in the 2020 Federal Budget for services assisting the mental wellbeing of small business (NewAccess for Small Business) owners should be made permanent, integrated with dispute resolution processes and reviewed regularly to ensure they are meeting the needs of small business owners. Following engagement through NewAccess for Small Business and where a mental health coach feels it reasonable, a small business owner should via a bulk billed referral from their GP be able to access a Mental Health Treatment Plan with a mental health professional who has experience with small business matters.

Review of previous work

This Report builds on findings in our earlier report entitled *Access to Justice: Where do small businesses go?*[1] That earlier report surveyed 1,600 small businesses which had experienced a dispute, to better understand their general approaches to dispute resolution and what they did (or did not do) when encountering serious business disputes.

We found:

- 22% of small businesses had been in at least one dispute in the last 5 years.
- 9 of 10 businesses speak to the other party before escalating a dispute.
- Almost half of small business disputes concern the payment of invoices (44%).
- The risk of damaging business relationships is substantial, as 40% of disputes occur with a supplier of goods and services and 46% involved clients and customers.
- Even accounting for the most serious disputes, 41% of businesses are able to resolve the dispute without escalating to a formal dispute resolution process.
- Although larger businesses have a greater overall number of disputes, they are also more effective at resolving them before escalation (67% for larger businesses compared to an average of 41% for smaller businesses).
- For disputes which eventually adopt more formal legal pathways –
    - over 60% of respondents report that they consulted a lawyer.
    - regional businesses are more likely than their urban counterparts to consult a lawyer and more likely to talk to another business or their accountant.
    - half of respondents consider that the time and effort required for a formal legal pathway is unreasonable.
    - the average cost of formal legal pathways was over $130,000.
    - 2 out of 3 business relationships ended following such formal pathways.
- Of disputes that were escalated but ultimately abandoned, the predominant reason was that costs outweighed potential gains.

The key findings highlight several issues that are faced by small business when resolving a dispute:

1. *Periodic disputes are stressful and there is a need to seek support*
   Although disputes are not a regular part of conducting business, they can have a significant impact on the viability of a business. Businesses commonly reach out a lawyer, accountant, or another business for assistance in such disputes.
2. *Seeking less formal dispute resolution channels before legal action is taken is critical*
   Formal legal resolutions are costly, stressful, and frequently abandoned. They also hold the potential for irreparable damage to business relationships. There is a clear need for dispute resolution channels that are less formal, timely and cost effective.
3. *Non-legal channels of dispute resolution need to be tailored for small business*
   Dispute resolution services for small business need to have a focus on dispute resolution while maintaining good working relationships with suppliers and customers. They need to recognise power imbalances and be designed to produce equitable outcomes.
4. *Mental health stresses need to be managed alongside disputes*
   Finding ways of reducing stress in a dispute resolution process and identifying avenues for addressing mental health and physical wellbeing are important for improving access to justice and supporting business viability.

[1] Available at https://www.asbfeo.gov.au/justice-for-small-business

Laying a better commercial foundation

Outcome A

The Australian Small Business and Family Enterprise Ombudsman will produce a best practice guide to dispute resolution for inclusion in small business contracts that includes:

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Recommendation 1

Unfair Contract Terms legislation should be amended to:

a. apply to all standard form contracts with a small business (regardless of value and including those with Government) where the small business has either less than 100 employees or $10 million annual turnover;
b. pursuant to (c), make unfair contract terms void, rather than voidable, in any and all versions of the applicable standard form contract, with substantial penalties and compensation payments for those terms which are deemed unfair; and
c. for the purposes of (b) and alongside the existing court and tribunal jurisdiction over the legislation, the ACCC or ASIC (for financial matters) should be empowered to make findings of unfair contract terms, levy civil penalties and ensure action, with their decisions subject to appeal to the Administrative Appeals Tribunal.

Outcome B

The Australian Small Business and Family Enterprise Ombudsman will as a matter of urgency investigate the best approach to eliminate unfair practices that may occur even where otherwise fair terms are used, including whether failure to have a dispute resolution clause constitutes an unfair business practice.

Contracting and commercial practices have not kept pace with best practice approaches to avoiding disputes and dispute resolution. Despite the Unfair Contract Terms legislation being enacted for several years now, unfair terms continue to be widespread and accompanied by unfair practices.

The Federal Government's legislation regarding unfair contract terms applies to standard form contracts entered into or renewed on or after 12 November 2016, where:

- the contract is for the supply of goods or services or the sale or grant of an interest in land;
- at least one of the parties is a small business (employs fewer than 20 people, including casual employees employed on a regular and systematic basis); and
- the upfront price payable under the contract is no more than $300,000 or $1 million if the contract is for more than 12 months.[2]

[2] https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms

Standard form contracts are those which have been prepared by one party, such that the other party has only a limited opportunity (if any) to negotiate the terms – that is, it is offered on a 'take it or leave it' basis. This is usually seen in contracts between a large business and a small business, and occurs in franchising where standard terms and conditions are pre-arranged and form part of the business model for the franchisor. Standard contracts are also seen in arrangements between Government entities and businesses, where the Government entity expects the acceptance of the standard contract in order to meet qualifying guidelines for tenders and procurement processes. However, it should be noted that the unfair contract terms legislation does not currently apply to Government contracts.

The legislation includes examples of terms which may be unfair, including terms that:

- enable one party (but not another) to avoid or limit their obligations under the contract;
- enable one party (but not another) to terminate the contract;
- penalise one party (but not another) for breaching or terminating the contract; or
- enable one party (but not another) to vary the terms of the contract.

However, terms that set the upfront price payable under a contract are not covered by the law. There are also certain contracts which are specifically exempt from the law, such as shipping contracts and company constitutions.

As it currently stands, a small business must go to court to have a contract term determined as unfair. Where a term is found by the court to be unfair it is made void. Considering, say, the case of a franchise agreement where that term is included in a standard contract between the franchisor and all the franchisees, each franchisee must take action to have that term removed from their contract, either by undertaking their own action or potentially by launching a joint action. Even where one franchisee has had a determination in their favour that a term is unfair, that finding does not flow through to all other standard contracts. There is also currently no requirement that a term which has been found unfair needs to be replaced with a suitable term, which can make an entire contract unworkable.

It is concerning that a small business is required to launch legal action against a large business in order to have a contract term deemed unfair, rather than the ACCC or ASIC having that power. This is especially true in cases where a small business has very limited, if any, ability to change their manner of operation should a business relationship fail (such as the relationship between a franchisee and franchisor). Telecommunications contracts and lease agreements with shopping centres pose similar difficulties.

The ACCC uses its authorisation process to permit what could otherwise be unfair business conduct, including anti-competitive behaviour and misuse of market power. Being able to make a finding on small business contracts seems a natural extension of that current power, especially with regard to taking the matter to court on behalf of a sector (for example, a franchise standard contract).

The current limits of $300,000 for an upfront payment, or $1 million if an agreement is longer than 12 months, are far too low before contracts fall outside the regime. Although payments based on variable conditions, such as a percentage of gross sales, are excluded from the calculation, a 5 year contract could very easily reach the $1 million threshold and therefore put the contract out of the reach of unfair contract term legislation. Similarly, the restrictive definition of a "small business" to those employing fewer than 20 people (including casual employees) excludes protections from too many businesses that should be within the regime.

The vast majority of contracts where this Office provides assistance contain clauses that the Australian Competition and Consumer Commission has identified as unfair. The current Unfair Contract Terms regime, while offering a baseline framework, provides insufficient protection to small businesses. For example, we see many instances of unilateral variation clauses that continue

to be commonly used to place small businesses in a vulnerable position when dealing with large companies. However, to have such clauses declared formally void (as opposed to being identified as such by the ACCC) requires a small business to have this determined by a formal legal process via a tribunal or court. This is clearly an undesirable outcome for the small business. Determinations on fairness should be able to be made by the ACCC and, for financial matters, ASIC, rather than by courts alone. Like courts, these bodies should also then be able to levy civil penalties for breaches.

Unfair Contract Terms should be made automatically void in all standard contracts in which a term has been deemed unfair. As discussed in the section above, the current situation where a term is "voidable" – that is, each business covered by the contract needs to take their own enforcement action through the court system – this is a real impediment for small businesses to be treated fairly. This amendment will allow small businesses to avoid costly and protracted processes to enforce their rights in relation to these terms.

The current cap for the regime to apply (eg. an annual contract value of less than $300,000 with less than 20 employees) is far too low and leaves many small businesses unprotected. Further where a contractual term is unfair, a small business needs to apply to a court to enforce its rights. Given the low likelihood a small business will go through that process, large businesses are not motivated to address unfair contract terms in their contracts. The unfair contract terms provisions should be expanded to include all standard form contracts with a small business regardless of value and Government must be seen to be leading by example in its own procurement practices by having its contracts fully compliant with the unfair contract terms regime.

Australian Small Business and Family Enterprise Ombudsman example

When we provide assistance to small businesses in disputes, it is commonplace for there to be unfair terms in standard form contracts that include:

- Non-disclosure of contract terms prior to execution (e.g. contracts may be presented on an electronic device and the salesperson scrolls to the signature page without allowing the small business to read the contract or get advice)
- Misrepresentation of the nature of an agreement (e.g. referring to a contract as a "purchase agreement" when in reality it is a rental agreement)
- Use of "entire agreement clauses" that say negate all prior statements and promises made by salespersons that convince a small business to enter into a contract
- Personal guarantees, including security over a person's family home for minor debts
- Contract auto-renewals (with extended terms (eg. 5 years) and termination notice periods)
- Ability for one party to unilaterally change contract terms.

One of the worst examples of a standard form contract was a short 2 page contract for business coaching services that included terms where the small business was required to agree:

1. to waive all rights of action against the coach and forfeit all rights to sue;
2. that the coach had no liability whatsoever for advice, acts or omissions and should it be found to be liable then liability would be limited to a refund of amounts already paid;
3. that the business would not act on any of the matters covered by the coaching without first seeking other professional advice;
4. to be liable for the full fee on termination, including where the coach unilaterally terminates the agreement; and
5. to indemnify the coach and pay any legal costs of the coach.

Although this business coaching contract is particularly bad example, it is very common for a number of the clauses set out above to be present in any contract that we see.

The *Enhancements to Unfair Contract Term Protections: Regulation Impact Statement for Decision September 2020* provides a number of "preferred" options that are broadly consistent with our Recommendation 1, including:

a. making unfair contract terms unlawful and providing a power to impose a civil penalty, although the Regulation Impact Statement restricts this to courts and tribunals to decide (Legality and penalties, Option 3);

b. providing flexible remedies when a contract term is unfair, such as giving courts and tribunals the power to (i) vary or substitute an unfair term (rather than it being automatically void), (ii) extending remedies to small businesses that are not party to the actual case but have suffered as a result of the unfair term, and (iii) creating a rebuttable presumption that unfair contract terms used in substantially similar circumstances are unfair, although this presumption is again limited to circumstances where a matter is being heard by a court or tribunal (Flexible remedies, Options 2, 3 and 4);

c. expanding the definition of small business to include businesses with a less than 100 person headcount or having less than a $10 million annual turnover (Definition of small business contract: headcount/turnover threshold, Option 3);

d. removing the contract value threshold altogether (Definition of small business contract: contract value threshold, Option 3); and

e. improving clarity of the definition of standard-form contract, such as certainty regarding factors like repeat usage of a contract template, and whether the small business had an effective opportunity to negotiate the contract.[3]

However, a key difference in the Regulatory Impact Statement is that it continues to leave the enforcement of the rules to the courts and tribunals. This has already proven to be a significant barrier for small businesses achieving fair contractual outcomes. Also, despite the rebuttable presumption that unfair contract terms used in similar circumstances are unfair, this still requires a small business to have their matter heard in court. Given that the Regulatory Impact Statement recognises that unfair contract terms "are still prevalent in standard form contracts", this presents a significant hurdle to ensuring that standard form contracts finally become fair and lay a better commercial foundation for all businesses to grow.[4]

Under "Legality and penalties", the Regulatory Impact Statement includes Option 4 that, if adopted, would include strengthened powers for regulators. However, the Statement does not prefer this Option. If enacted, Option 4 would provide regulators with the power to determine if a term is unfair, request that it be varied, and issue infringement notices. It would then be open to a business to challenge a regulator decision in a court or tribunal. The Statement rejects this option broadly on the basis that determinations would require analysis of complex legal distinctions and involve significant discretion being exercised. The Statement nevertheless notes that infringement notices may become "a more appropriate enforcement option at a later stage" as the law continues to develop and presumably becomes clearer.[5] However, this points to a need to further refine the drafting of the rules and supplement them by clear guidance, such as the proposals to improve the clarity of the definition of standard-form contract.

[3] Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading and consumer protection agreed to these options by *Joint Communique* following their meeting of 6 November 2020 (https://consumer.gov.au/sites/consumer/files/inline-files/CAFCommunique-20201106.pdf).
[4] *Enhancements to Unfair Contract Term Protections: Regulation Impact Statement for Decision September 2020*, p.5.
[5] *Ibid*., p.51.

Without the ability for regulators to make these types of determination, it is likely that unfair contract terms will continue to persist in standard form contracts since small businesses simply do not have the resources to mount legal challenges against large businesses and see these through appeal channels.

Unfair contract terms notwithstanding, unfair business practices are an ongoing problem for small businesses. Limiting access to supply chains or introducing new products which a franchisor must produce, and at a price which is unsustainable or unprofitable, are examples of unfair practices which may not necessarily fall under an unfair contract term. For example, it is perfectly reasonable for a franchisor to introduce new products, and for a franchisee to be obligated to produce and sell those products; however, the price point of the new product, the supply chain, or the profit or loss margin may be an example of a practice which is unfair.

Other examples of unfair practices that we commonly see include:

- Chargebacks to a small business where credit cards or online accounts may have been used by customers fraudulently.
- Extended/late payment times and use of supply chain finance to extend these times.
- Large businesses imposing pricing structures and business models designed for urban use in a regional setting (e.g. requiring remote area delivery fees based on the cost of city deliveries).
- Clawbacks of fees paid to small businesses where there is a lack of transparency and where small businesses have no real ability to mitigate the clawbacks.
- Inducement of small businesses to invest on the basis that supply contracts will be renewed but where there is no intent to renew.
- Contracting practices that do not include clear internal dispute resolution processes as well as independent and external alternative dispute resolution processes.

In a recent address the Chair of the Australian Competition and Consumer Commission (ACCC), Mr Rod Sims, also pinpointed unfair business practices as a real concern for the ACCC.[6] The core of the problem is that the courts adopt a narrow view of the common law principle of unconscionable conduct and, with no statutory protection, small businesses are left wide open to unfair practices. Although Mr Sims reports that the ACCC often uses the principle of unconscionable conduct, successes in legal actions tend to be when a business admits liability rather than a court making a finding of unconscionable conduct. Further, although courts may find harsh and unfair treatment this will often fall short of being held to be unconscionable. This leaves a small business with no remedy.

Mr Sims also reports that the Courts recently appear to be setting a high bar for what is considered to be unconscionable:

> "In one case, now on appeal, the judge indicated that 'unconscionability' must involve conduct against a person or a small business who is at a special disadvantage. This view, which is the subject of our appeal, restricts the law to a narrow common law principle dating back three centuries, despite the law having moved on with parliament legislating prohibitions that step away from such past doctrines."[7]

As a result of these difficulties in tackling unfair practices, both Mr Sims and the President of the Victorian Court of Appeal have recently called for the introduction of an unfair practices prohibition. The sorts of matter that would be subject the prohibition would be those that would be unlikely to

[6] https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era
[7] *Ibid.*

be found by a court to amount to unconscionable conduct but are unfair, and would include *inter alia*:

- Digital platforms failing to remove known scams
- The use of data about business operators (and other means) to target them with sales approaches when they are vulnerable
- Small businesses being threatened with commercial consequences unless they agree to change contract terms or accept considerably less than what they are entitled to
- Larger businesses demanding that their small business suppliers provide them with the cost and source of their key inputs, and then establishing a competing, near identical, 'home' brand.

In the operations of the Ombudsman, we have seen many examples of these types of unfair practice – they are common, leave small businesses exposed to abuse and create a commercial environment where small businesses struggle to grow and survive.

The full breadth of these unfair practices needs scrutiny, as well as the most effective ways to deal with them. A particular difficulty here is that it is challenging to include all examples under the unfair contract terms rules since some bad practices result from the absence of an appropriate contract term whilst others might result from a number of otherwise innocuous contract terms being used in tandem to produce an unfair result. Some practices like simple late payment are just bad. The issue here lies in the way that the unfair contract terms law is framed. The law isolates a specific contractual term and then applies certain tests to determine whether that clause is unfair within the context of the contract as a whole.

The Ombudsman will as a matter of urgency undertake further work to define the breadth and types of bad practices and help determine ways that they can be dealt with holistically under both the unfair contract terms and other supporting regimes, such as a specific prohibition on unfair practices. For example, whether by failing to include dispute resolution in a contract could be considered to be the equivalent of an unfair term and, in such instances, whether a default "fair" term that provides access to mediation might be deemed to apply.

Similarly, consideration needs to be given to whether a group of terms when considered together in the way that they are applied should be able to be considered unfair as a group. This might include where those terms might be used to permit behaviour that would otherwise be unfair under the unfair contracts term regime, such as:

- avoiding or limiting performance under the contract;
- having the effect of unilaterally varying the terms of the understood contract; or
- unilaterally varying the characteristics of the goods or services supplied.

As Mr Sims stated in his address:

> "…in my view there is no place for unfair contract terms. And there is no place for unfairness that sees significant detriment from highly questionable business practices."[8]

[8] *Ibid.*

Promoting alternative dispute resolution

Recommendation 2

All Codes of Conduct, whether voluntary or mandatory, should have a clear and comprehensive dispute resolution process, modelled on the ASBFEO best practice guide, that includes:

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"A listed entity should:

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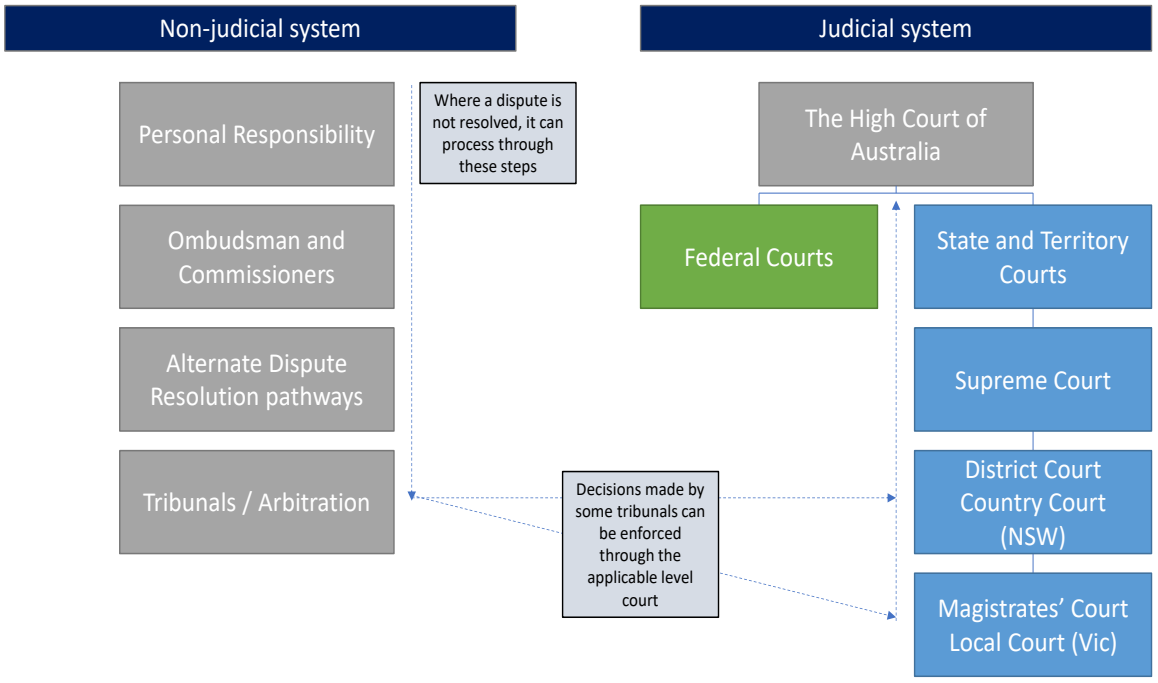
Current dispute resolution approaches

Australia's dispute resolution framework includes the traditional court system as well as less formal pathways which have been developed over several decades. These pathways include services delivered through this Office, or other Ombudsman's offices and Commissioners; industry codes of conduct; alternative dispute resolution processes such as arbitration and mediation; and tribunals.

In this section, a brief outline of the manner in which each dispute resolution process works has been included, as well as providing discussion on the pros and cons of each. These, along with significant stakeholder engagement, have led to the development of the Recommendations.

A simple structure of the dispute resolution framework is included below. Typically speaking, dispute resolution should start at the top of the left-hand column "Non-judicial system" with an attempt to resolve the matter between the parties, then at either *Ombudsman and Commissioners* or *Alternative Dispute Resolution*, then working down through the options in that column. Should the need arise, the process can cross onto the bottom of the right hand "judicial system" column, as indicated. A more descriptive figure of the judicial system in included in Appendix A.

Figure 1: Australia's dispute resolution framework with indicative escalation pathways



Role of an Ombudsman and Commissioner

There are a number of Federal and State Government bodies headed by an Ombudsman or Commissioner, which hold various powers to assist small businesses and representative organisations across a broad range of issues, principally to help provide dispute resolution and in many cases to advocate on behalf of small business. The Australian Small Business Family Enterprise Ombudsman and the State-based Small Business Commissioners (in New South Wales, Queensland, South Australia, Victoria and Western Australia) are examples of such organisations. Other bodies that offer specialist support for small business include the Fair Work Ombudsman, the various industry Commissioners such as the Aged Care Complaints Commissioner, the Australian Financial Complaints Authority, and the Telecommunications Ombudsman.

Australian Small Business and Family Enterprise Ombudsman example

A recent example with the Ombudsman concerned a small business with a large leased fleet of cars that it sub-leased to ride-share drivers. Demand for ride-sharing had suffered as a result of government restrictions to contain COVID-19 and this impacted the ability of the small business to meet its own financial obligations with its car leasing company. The small business was given notice that vehicle recovery action would occur almost immediately. We acted promptly to help define the elements of the dispute and provided the parties with a notice to conciliate. This approach was effective since recovery action was temporarily paused, providing a breathing space for the parties to negotiate. The parties resolved the dispute within 2 weeks without the need to engage in the conciliation.

The Australian Small Business and Family Enterprise Ombudsman responds to requests for assistance from small businesses and family enterprises that are in dispute with other businesses or Commonwealth Government agencies. It is our express aim to avoid disputes having to go to court. This Office provides tailored assistance, information on how to resolve a dispute, and facilitates discussions between the disputing parties. We provide access to external alternative dispute

resolution services or provide a reference to another Commonwealth, State or Territory agency, such as State Small Business Commissioners who offer dispute resolution services.

The Australian Small Business and Family Enterprise Ombudsman also administers a number of Industry Codes including the Franchising, Oil, Horticulture, and Dairy Codes. The Ombudsman can provide tailored dispute resolution processes where disputes fall under one of the administered codes.

The role of an Ombudsman and Commissioner is vital for dispute resolution, particularly for small business. In the instance of this Office, we provide an independent and cost-effective primary triage service for small businesses. The service not only provides information about how to resolve a dispute and the nature of the specific dispute at hand, but also the reassurance for small business owners that there are various options for dispute resolution that do not involve needing to go to court.

The offices of Ombudsman and Commissioner are well-regarded by small businesses, with strong processes for information delivery and speedy and cost effective dispute resolution pathways.

Codes of Conduct

Broadly speaking, Codes of conduct are used to describe the responsibilities, rules, and standards of an industry, including the relationship between an individual or a group of industry participants, or their customers.[9] Importantly, Codes provide an industry the opportunity to develop a dispute resolution process which diverts disputes from the court system, and can set out requirements for the parties in a dispute to act in good faith – that is, that they have to take part in a dispute resolution process with the intention to resolve the dispute.

Case study

Sally owns and runs her small family dairy farm in the south-east of Queensland. The milk her farm produces is processed by a plant in northern NSW. The processing plant has recently been bought by a multinational food company. Sally enters a new contract with the processor, but, in early March 2020 and 12 months into the contract, the processor tries to vary the payment terms, extending them to more than four months from delivery of the milk, as well as varying the price of the milk itself. This will put significant strain on Sally's cash flow and will likely result in her being unable to fund a small expansion she had planned, as well as the need to reduce her staffing levels. Sally would like to negotiate with the processor over the new payment terms.

Sally is concerned about the new payment terms which the processor is trying to push her into accepting. Sally knows there is a Dairy Code of Conduct, but doesn't know much about it, or what it entitles her to. After speaking to another farmer in her area, Sally calls the Australian Small Business and Family Enterprise Ombudsman for information. She is provided with a copy of the Code, as well as some information regarding her rights, and her options for dispute resolution. As the primary manager of the family farm, knowing that there is a dedicated avenue for advice for her small family business gives Sally some much needed support and relief as she considers her options when challenging the multinational.

We'll continue to look at Sally's dispute with the processor through this report.

[9] https://treasury.gov.au/sites/default/files/2019-03/p2017-t184652-5.pdf

Codes of Conduct fall into three categories:

1. **Self-regulated and voluntary codes**
   These are developed and maintained by an industry body and encourage businesses within that industry to adhere to a standard of ethics or behaviour. Successive Governments have stated a preference for self-regulating industries which have developed a strong voluntary Code of Conduct.[10] There are many voluntary industry codes of practice.

   In the guidance documentation for the creation of a voluntary code of conduct, the Australian Competition and Consumer Commission notes:

   > *"Research…suggests that codes of conduct tend to be more effective when the self-regulatory body operates an effective system of complaints handling."*[11]

   The ACCC guide includes information on the creation of a reasonable dispute and complaint resolution process which starts with mediation then, should that fail, moves to either a committee of the industry body, or preferably, to an independent body for resolution. The guide notes that an independent body should not only provide access to justice, but is seen to be providing access to justice – i.e. a committee made up of industry representatives may not generally be seen as an independent enough body to review complaints.

   Although the ACCC guide provides a sound framework for voluntary Codes of Conduct, the frameworks remain exactly that: voluntary. In considering a voluntary Code around payment times, the New Zealand Government noted that 'generally, voluntary codes seem to have very low levels of uptake and there is scant evidence they are effective'[12] – the Australian experience is similar. While the ACCC offers to work with industry bodies in the creation of their Codes, that input is not compulsory and there is no standard which dispute resolution processes must meet.[13] Where an industry body develops a Code, it is still up to individual members of the industry whether they apply all, some, or none of the Code, and they can generally choose to ignore any part they wish, including a dispute resolution process which may have been written into the code. Very few voluntary Codes stipulate a penalty associated with any breach of the Code.

   Separately, the Australian Securities and Investments Commission (ASIC) has a monitoring role in some voluntary codes, such as the Australian Banking Association's Banking Code, the Financial Adviser Standards and Ethics Authority (FASEA) Code of Ethics, and the ePayments Code. Each of these codes include dispute resolution processes and, in the case of the ePayments Code, does include a prescription for compensation where non-compliance with the code is discovered.[14] It is worth noting that while the Banking Code is a voluntary code, once a financial institution agrees to be covered by that Code, the institution is then bound to follow the code, including the dispute resolution process. ASIC also requires that providers of certain financial services are members of the Australian Financial Complaints Authority, which is described further below.

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[10] *Ibid.*

[11] https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf

[12] *Improving business-to-business payment practices in New* Zealand, New Zealand Ministry of Business, Innovation and Employment, February 2020, p.22.

[13] The ACCC does note that Standards Australia has developed a benchmark standard for effective complaints handling (AS4269).

[14] https://download.asic.gov.au/media/3798542/epayments-code-published-29-march-2016.pdf

2. **Mandatory prescribed codes of conduct**

These codes are legally binding on all industry participants within the specified industry – for example, the Franchising Code applies to all franchisors and franchisees that are defined within the Code. These codes are prescribed within the *Commonwealth Competition and Consumer Act 2010* (CCA) and are regulated by the ACCC.

There are currently 9 mandatory prescribed codes:

- Franchising Code of Conduct
- Horticulture Code of Conduct
- Wheat Port Code of Conduct
- Oil Code of Conduct
- Dairy Code of Conduct
- Electricity Retail Code
- Grocery Unit Pricing Code
- Sugar Code of Conduct
- National Cabinet Mandatory Code of Conduct regarding SME Commercial Leasing Principles During COVID-19

These codes vary in their prescriptiveness regarding dispute resolution. For example, the Dairy Code of Conduct includes a requirement for a process for dispute resolution to be included in milk supply agreements (including the potential for binding arbitration should that be written into an agreement, or if it is later agreed between the parties), that parties must act in good faith when trying to resolve a dispute, as well as the role of this Office in providing information on options to resolve Dairy Code disputes including access to mediation and arbitration services. A similar degree of stipulation exists in the Sugar Code. The Franchising Code of Conduct prescribes that a dispute resolution process be written into franchise agreements together with the time periods allowed for each stage of the process. In comparison, the Electricity Retail Code is silent on the issue of disputes.[15]

The National Cabinet Mandatory Code of Conduct regarding SME Commercial Leasing Principles During COVID-19 is a temporary mandatory Code of Conduct which is intended to run from 3 April 2020 for the period during which the Commonwealth JobKeeper program remains operational.[16] This Code includes a binding mediation clause which states that matters which cannot be resolved between a landlord and a tenant shall be referred and subjected to applicable state or territory dispute resolution processes for binding mediation. The implementation of this Code evidences that a nationally agreed Code on a matter which lies within state and territory responsibilities can be mandated in a harmonised manner.

As mentioned above, ASIC also requires suppliers of financial services be members of and provide funding for the Australian Financial Complaints Authority (AFCA), which has consolidated the functions of the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.[17] AFCA is empowered to resolve complaints between consumers and small businesses, and financial services providers. The decisions of AFCA are binding on the financial services provider involved but can be appealed through the court system by the other party involved in the dispute. AFCA has a well-

[15] It is important to note that the Electricity Retail Code is only applicable to retailers who supply electricity to small customers (as defined in the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019)* in New South Wales, South Australia and south-east Queensland. Customers of electricity retailers are generally covered by the appropriate Ombudsman in each individual State or Territory.

[16] https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf

[17] https://www.afca.org.au/about-afca

developed process for dispute resolution which includes mediation, conciliation and independent decision making where necessary. It should be noted, however, that the Australian Banking Association has included a separate dispute resolution process within its own voluntary Banking Code for their members who have signed up to that particular Code.

Australian Financial Complaints Authority example

An example of a form of determinative dispute resolution, akin to arbitration, is employed via the Australian Financial Complaints Authority (AFCA). AFCA is an independent organisation that has a role of assisting small businesses to reach agreements with financial firms that are members of AFCA about how to resolve complaints. The service is free to the small business.

All Australian financial services licensees, Australian credit licensees, authorised credit representatives and superannuation trustees are required to be a member of AFCA under their financial services licence conditions. Members include banks, insurers, credit providers, financial advisers, debt collection agencies and superannuation trustees. AFCA has over 35,000 members nationwide, although it should be noted that there is generally no requirement to become an AFCA member where services are offered only to businesses.

Where a dispute is taken to AFCA and an approach cannot be agreed between the small business and the financial firm, AFCA will then decide an appropriate outcome that is binding on the financial firm (the small business can choose whether or not to accept the outcome). That is, AFCA determinations are binding on the financial firm if the small business complainant accepts the outcome (noting that different rules apply to superannuation complaints).

Where a small business is dissatisfied with AFCA's determination, it can pursue other remedies such as alternative dispute resolution or formal legal channels. The Ombudsman can provide assistance with unresolved disputes via alternative dispute resolution.

3. **Voluntary prescribed Codes of Conduct**
   There is currently only one voluntary Code of Conduct which is prescribed under the Competition and Consumer Act; the Food and Grocery Code of Conduct.[18] This Code provides a framework for dealings between retailers and wholesalers and suppliers, and once a business has signed up to the Code they are legally obliged to adhere to it. ALDI, Coles, Woolworths and Metcash have agreed to be bound by the Code.

   The Code includes a defined dispute resolution process which allows a supplier to deal directly with the retailer or to proceed directly to mediation or arbitration, with the Code specifying the nature of the mediation or arbitration. The ACCC is responsible for enforcing the Code and has certain powers to require information and undertake compliance checks, although the ACCC does not act in respect of individual disputes.

   Voluntary prescribed codes are seen as a testing ground for the willingness of an industry to adopt the commitment of a Code without the requirement for Government to mandate the Code's imposition on an entire industry. The Government has stated that should parties to a voluntary prescribed code be "unwilling to reach agreement on a voluntary code, it may influence the Government's decision on the necessity to implement a mandatory code".[19]

The three types of Codes of Conduct result in varying outcomes for small businesses when trying to resolve disputes. Voluntary industry codes may have – but are not required to have – dispute

[18] https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct
[19] https://treasury.gov.au/sites/default/files/2019-03/p2017-t184652-5.pdf

resolution processes written into them but may not have penalties for when the processes are not followed. Voluntary codes are often unappealing to a business that knows it is already on the border of acceptable behaviour, which makes the likelihood of such a business adhering to a code even less likely. Some industries, such as the financial services sector, may be covered by multiple Codes – such as the voluntary Code instituted by their industry body, by the AFCA, and for individual employees by the Financial Adviser Standards and Ethics Authority Code of Ethics – each with their own dispute resolution process. Given their voluntary nature and lack of penalties for non-compliance, some voluntary industry codes may be well meaning, but are ultimately meaningless in their effect.

Any code which includes a clear and mandated dispute resolution process provides some certainty for small business. Clearly, the standard should be taken as those compulsory industry codes which include a well stated, clear and prescriptive dispute resolution process, such as the Dairy Code. This code delivers a robust framework for disputes to be resolved, and requires that dispute resolution processes must be entered into in good faith by requiring consideration whether parties have:

- acted honestly and not arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives.
- tried to cooperate with the other party to achieve the purposes of any relevant milk supply agreement.
- conducted the relationship in recognition of the need for certainty regarding the risks and costs of supplying or purchasing milk.
- conducted the trading relationship without duress – that is, there cannot be any acts of retribution.

However, where dispute resolution via a method such as mediation fails, there should remain an ability to move the dispute (or the part that is not resolved) to an arbitration process. As will be further discussed in this report, independent and binding dispute resolution processes can be helpful in producing an outcome in what can be complex disputes. Alternative dispute resolution processes, and specifically mediation and arbitration, have been written into several mandatory industry Codes of Conduct, such as the Dairy Code and the Sugar Code. This shows that, in certain circumstances, the Commonwealth recommends, and can require, a binding alternative dispute resolution process.

Australian Small Business and Family Enterprise Ombudsman example

The Ombudsman administers the dispute resolution process under a range of industry codes that commonly use mediation but may not include arbitration or another form of determinative resolution should mediation fail.

Under the Franchising Code of Conduct, we had 78 franchisees approach our office for assistance in respect of a number of issues with a particular franchisor, particularly lengthy time delays from sign-up to start of trading. The franchisor had also received from franchisees significant payments in advance for rent and rental bonds, certification and fit out. A number of the mediations were unsuccessful in achieving a resolution and franchisees were left with the option of doing nothing or themselves pursuing formal legal action (that some did).

In this matter, the Australian Competition and Consumer Commission (ACCC) ultimately took action against the franchisor itself with the result that the franchisor went into administration.

Where industry codes provide a dispute resolution process for disputes that fall under a code, the majority of these disputes are successfully resolved. Where a clear dispute resolution process is not provided for, businesses often feel unsure about raising an issue with the other party in case it leads to a protracted and expensive legal dispute. This can lead to breakdowns in business relationships that could otherwise be quickly repaired.

Australian Small Business and Family Enterprise Ombudsman example

The lawyer for a franchisor approached our Office with a dispute for mediation under the Franchising Code of Conduct. The dispute related to a franchisee allegedly not complying with certain standards as outlined in the Franchise Operations Manual, including product dating safety, cross contamination prevention, product preparation, cleanliness, record keeping, equipment maintenance, personal grooming/uniform, signage and marketing materials.

We had some difficulty contacting the franchisee. The franchisee was feeling overwhelmed by the situation and was thinking of abandoning his franchise and returning to his country of origin. He did not understand the process of mediation under the Code and was concerned about being contacted by the Ombudsman.

We discussed the role of our Office and the process of mediation under the Franchising Code. The franchisee agreed to attend mediation. The matter was handed over to the mediator. The mediator managed the parties and helped the franchisee to further understand the mediation process. While slow to engage with the process, but with greater understanding, the franchisee attended mediation and the dispute was resolved between the parties.

All industry Codes, whether voluntary or mandatory, should require that parties who are covered by a code are required to enter alternative dispute resolution proceedings, and must do so in good faith – that is, they have an intention to resolve the matter through that process. The process for dispute resolution within a Code should be clear and concise and should be mandatory for those businesses which sign up to the Code.

Pursuant to Recommendation 1, for those industries that do not have a Code of Conduct that includes a dispute resolution process or where a business is not otherwise bound by a relevant Code, the Ombudsman should produce a best practice guide which sets out good contracting practices and a model process by which dispute resolution can be undertaken. The process will be able to be included in contracts to cover small business matters.

Case study

Sally has now read the Code of Conduct and understands that both she and the processor must try to resolve their dispute in good faith. This a relief for Sally – it means that she can sit down with the processor and negotiate with the aim of reaching an agreement. Sally was worried that the processor would just force the new terms upon her, or potentially act in some other punitive manner, and she knew that she wouldn't be able to afford the time or the money for a court case.

The Code of Conduct includes the provision for mediation. Sally contacts ASBFEO, explains her case, and ASBFEO arranges mediation for Sally and the processor. A mediator is located in the Northern Rivers area of NSW who has experience with the dairy industry. A neighbour has used the same mediator for a different matter a few years ago and is full of praise for the mediator's style and expertise. Sally prepares for the mediation process by looking at the financial impact the new terms would have on her farm.

Another recommendation to ensure that best practice dispute resolution is used is to leverage the ASX as an important driver of the corporate governance behaviour of listed companies. This is recognised by the ASX in their 'Corporate Government Principles and Recommendations':

> The phrase "corporate governance" describes "the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled within corporations. It encompasses the mechanisms by which companies, and those in control, are held to account."
>
> Good corporate governance promotes investor confidence, which is crucial to the ability of entities listed on the ASX to compete for capital.[20]

The Ombudsman recognises that the ASX updates their Principles and Recommendations infrequently (there have been three updated editions printed since they were first released in 2003), however we believe that a foundational part of good corporate governance is a clear dispute resolution process by which both the company and their clients and customers can be held to. Therefore, the Ombudsman is recommending that the ASX include, in its next edition, a recommendation under Principle 3 regarding a non-judicial dispute resolution process, and the inclusion of a summary in the entity's annual report of disputes which have gone through this process in the financial year under the report.

Given the infrequent update of the Principles and Recommendations, we also recommend that, in the meantime, an appendix be issued by the ASX that requires a company to develop and utilise a non-judicial dispute resolution process to help satisfy the ASX requirement that a listed entity has an "appropriate structure and operation".[21]

Alternative dispute resolution

Alternative Dispute Resolution (ADR) processes involve an impartial person assisting those in a dispute to come to resolution. They are less costly and time intensive, and most importantly less stressful than formal legal processes. ADR processes include mediation, conciliation, conferencing, neutral evaluation, case appraisal, and arbitration.

ADR processes typically have high success rates, with up to 92% of cases referred to mediation or other collaborative pathways being resolved.[22] Satisfaction with the outcome is also high, with 77% of parties to small business disputes satisfied with ADR mechanisms compared with 10% satisfaction for legal advice.[23] The high satisfaction rate is the result of parties feeling more involved and the sense that there is more participation by the small business in the process. Even when ADR does not produce an outcome where the dispute is resolved, the process can help define or discover the specific issues which are under dispute.

While ADR is typically more expensive than filing fees for a court process ($2,000 - $3,000 would be average for an ADR process, while filing fees are included in Table 2, below), the lack of any required or recommended legal representation leads to a reduced cost.[24] There is no transfer of legal or representative costs between either party, and the more consultative nature of the process (when compared to the formal legal system) helps maintain business relationships and produce innovative outcomes.

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[20] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 4th Edition, February 2019.
[21] ASX Listing rules, Chapter 12 *Ongoing Requirements*, p.1202.
[22] Victorian Government, *Access to Justice Review*, 2016.
[23] Department of Innovation, Industry, Science and Research, *Small Business Dispute Resolution Research Report,* 2010.
[24] The ASBFEO notes that while legal representation is not required for ADR processes, it does recommend that any Small Business entering any dispute resolution process does so with some level of support even if with a lay person.

In consultations performed by the ASBFEO, the inclusion of mandatory mediation in contracts has been raised as an appropriate way to ensure the successful use of ADR. A Victorian Small Business Commission report found that having ADR clauses written into contracts as a mandatory stage of dispute resolution, being used before resorting to litigation, resulted in better business relationships.[25]

It is important to note that not all cases will be suitable for ADR processes – for example, disputes involving matters of intellectual property rights, or where there are extremely technical legal arguments may not always be well suited. Identifying the appropriateness of ADR pathways may be facilitated through screening and referral techniques to protect those at risk of abuse through the system.[26]

Types of alternative dispute resolution

Conferencing, case appraisal or neutral evaluation can provide a forum for both parties to discuss the dispute with a neutral third party. The aim is to identify key issues and agree on the next steps:

A. *Conferencing*
   The parties to the dispute meet with a dispute resolution practitioner. The goal is to define the issues under dispute, identify what further evidence needs to be gathered, and explore dispute resolution pathways.

B. *Case appraisal*
   Case appraisal is an investigative process. The appraiser takes documents and statements from both parties and provides advice to the parties on desirable outcomes and how they might be achieved. Further investigation may be required after the process. It is most suitable in situations where parties need advice on direction and what further evidence to gather.

C. *Neutral evaluation*
   Neutral evaluation involves parties presenting arguments and evidence to a dispute resolution practitioner. The practitioner makes an evaluation on what the key issues are and the most effective way to resolve them. While the practitioner may have legal knowledge, they may not be a lawyer. They may, however, give advice on the possible outcome of the dispute. Neutral evaluation can help parties agree on the best course of action and can reduce the scale and complexity of issues to be dealt with in subsequent dispute resolution proceedings. Evaluations can be completed face-to-face or in written format. It is most suitable in situations where there are a large number of documents to assess, and when there are issues with evidence such as informal or verbal agreements.

The process of mediation and conciliation provides a less costly resolution than resorting to the court system. While the two processes are described separately below, there is often not a clear delineation between an ADR process being formally in mediation or conciliation – where appropriate, a mediator or conciliator can often move the dispute resolution process through both phases, as necessary:

D. *Mediation*
   Mediation involves parties discussing the dispute. A mediator facilitates the conversation but very specifically does not provide advice, acting as an independent third-party to help those in the dispute come to an agreement. Mediation is most suitable when parties wish to reach an agreement and control the outcome but want to have a third person to assist in the process. It is also suitable when maintaining a working relationship is an important outcome.

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[25] Office of the Small Business Commission, *Forming and maintaining winning business relationships*, 2007
[26] Victorian Government, *Access to Justice Review*, 2016.

E. Conciliation

Conciliation involves parties coming together to reach an agreement. The conciliator usually has expertise in a particular technical area, can provide advice during the process, may propose a formal resolution, and ensures any agreement adheres to any relevant legislation. It is most suitable in situations where parties want to reach an agreement on issues that involve technical or legal components and want advice on the facts of the dispute and/or the process. It is less suitable where a dispute does not require a high level of technical or legal knowledge.

Online Dispute Resolution

Online dispute resolution (ODR) is an enabling technology where a portion of the process – in some cases all of the process – is completed electronically. Examples can include the simple lodgement and distribution of documents through online portals, videoconferencing, and, in some advanced ODR processes, include artificial intelligence to process claims.[27] ODR is usually designed to be used in conjunction with traditional legal methods to facilitate more efficient resolution of disputes, although the breadth of ODR is continuing to evolve.

Videoconferencing is being more commonly used in both court hearings and ADR processes. It provides an effective way of reducing the logistical hurdles of having all parties in the same place. This is specifically important for regional and remote small businesses, allowing them to access dispute resolution services more easily.[28] Conditions created in response to the recent COVID-19 crisis has seen in increase in videoconferencing for ADR.

Videoconferencing provides positives and negatives for those involved in the process. If one of the parties feels unsafe being in the same room as another party, they can still communicate without having to speak face-to-face, thereby increasing the chances of coming to a resolution. However, this needs to be balanced against the fact that speaking directly to the opposing party allows both to be more considered in their tone and rhetoric and read each other's body language. Face to face conversation can lead to a more understanding frame of mind.[29]

Online Dispute Resolution in Australia

- The Federal Court of Australia offers a documentation eLodgement service, which can help to speed up the court process.
- The Commonwealth Courts Portal allows lawyers and parties in dispute to access real-time information about their cases.
- The Federal Court's eCourtroom is a virtual courtroom with the same rules and requirements as a physical one and can deal with entire matters.
- The Victorian Civil and Administrative Tribunal recently conducted a pilot program to conduct hearings online using video and file sharing technology.
- The Victorian Small Business Commission offers videoconferencing services for small businesses in dispute.

[27] NADRAC, *Dispute Resolution Terms*, 2003.

[28] Noting that a stable and reasonably high data speed internet connection is required for videoconferencing to be successful.

[29] As communicated to the ASBFEO during consultation.

The limits of non-determinative approaches

The process of ADR relies on both parties being willing to discuss a dispute and reaching an agreement, without an independent decision being imposed upon the parties. It is therefore, by its very nature, reliant on both parties either being or becoming willing to resolve the matter, and to abide by the agreement.

ADR processes are designed to be more informal, less rigid, and less combative than arbitration or litigation, as well as being able to produce more novel ways of resolving a dispute. Business relationships have a better chance of surviving the process, and parties are typically satisfied with the outcome, as would be expected where both parties have agreed to the way forward. Mediation, in particular, is designed to help the parties become more willing to find a resolution.

However, when one party decides to ignore or delay the agreement, the other party must proceed to an enforcement process in the court system, which can take considerable additional time and financial requirements. This same issue arises when one party wishes to dispute the resolution. Alternatively, the party trying to enforce the agreement can decide to abandon the matter. Both options – moving into litigation or abandoning the matter – are particularly poor outcomes where a small business is relying on an ADR agreement to enable them to continue operating. Where enforcement proceedings are undertaken in the court system, the process of preparing for ADR may provide a useful base for preparing court or tribunal evidence and may result in a more defined presentation of facts, subsequently reducing hearing times and costs.

Case study

Sally and the processor have had several rounds of mediation. At the suggestion of the Australian Small Business and Family Enterprise Ombudsman, Sally took a friend to the mediation. Her friend also runs a dairy farm in the same area, although they are contracted to a different processor, and they provide Sally with moral support and act as a sounding board during the breaks in mediation. Sally was surprised and felt a little overwhelmed when the processor was represented by a lawyer who had flown in from Sydney, and a corporate relations person from the processor's head office.

The mediator tries to bring Sally and the processor to an agreement. Sally is willing to move on some of the new terms, and the processor on others. Although they're close to reaching a deal, the processor breaks off at the last minute and says that it can't accept Sally's payment time as it will set a precedent for the rest of their farmers, despite an agreement being confidential. In this instance, mediation has not been successful, and Sally must consider her next option.

Providing easier access to determinative dispute resolution

Recommendation 4

Access to existing determinative dispute resolution channels should be improved:

a. Facilitate the Australian Small Business and Family Enterprise Ombudsman arranging voluntary, binding arbitration, alongside its current mediation referral system by:
   - Amending the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), such that the Ombudsman's powers to refer a dispute to alternative dispute resolution processes includes the power to refer to voluntary arbitration where matters are not already afforded arbitration through Codes of Conduct.
   - The Ombudsman would act as concierge for escalation to voluntary small business dispute arbitration, where the Ombudsman maintains a list of suitably qualified arbitrators familiar with small business matters and able to provide arbitration at a low cost.
   - Although mediation and other non-determinative forms of alternative dispute resolution should continue to be the default, escalation of disputes (and unresolved parts of disputes) to arbitration would be used for matters where mediation or other non-determinative resolution is not suitable.
   - ASBFEO would promote the use of model rules for arbitration, which can be altered by the participants as required.
   - Parties involved in the dispute would voluntarily agree whether or not to undertake binding arbitration with the cost of that process generally being shared.

b. The Federal Government should propose standard approaches, to be agreed through the National Cabinet, which will bring the current system of State and Territory-based Civil and Administrative Tribunals into common agreement such that the value of any dispute involving a small business that can be heard will have a value of up to at least $100,000 (with values above those at the state and territory levels being heard by the Federal Circuit Court). It should also include agreed standard timeframes to expedite dispute resolution.

Recommendation 5

A Federal Small Business Claims List (the List) should be formed as part of the Federal Circuit Court to hear matters between businesses which do not fall within the current state or territory tribunal framework, where at least one of the parties is a small business, and where the value of the dispute is up to $5 million (ie. damages for the List would be capped at $5 million).

a. In keeping with Constitutional limitations, the jurisdiction should apply where one of the parties is a constitutional corporation, or the matter involves the course of trade of commerce between Australia or places outside Australia or among the States/Territories or involves insurance, banking, telecommunications, or copyright, patents, designs or trademarks, or involves a Territory business.

b. The List should use flexible approaches and aim to resolve matters within 60 days of the lodgement of a matter, provided any small business involved does not request an extension. This may include mediation where alternative dispute resolution has not already been undertaken.

c. The List should include the ability for a small business to apply for a no adverse costs order.

d. The Australian Small Business and Family Enterprise Ombudsman should provide a triage service for small businesses contemplating the use of the List, prior to lodgement of action within the List, to receive subsidised initial advice from a relevant professional.

e. The List should receive sufficient additional funding to ensure that the 60 day timeline is maintained and use online systems, including for alternative dispute resolution options, with lodgement fees kept to a minimal level for small business applicants.

Although non-binding alternative dispute processes, such as mediation, allow parties to "own" their dispute and come up with innovative forms of resolution, there will be situations where mediation does not result in a resolution. In these situations, the ability to have the matter referred to a determinative form of dispute resolution, such as arbitration, is important so that parties do not have to move into the formal legal system.

Arbitration

Arbitration may be defined as:

> "a process of dispute resolution by which parties agree to have their disputes determined by independent and impartial dispute resolution practitioners…(it) makes a binding determination of the issues in dispute…(and) can include legal and/or technical experts of the parties' own choosing, and use procedures which the parties can select and influence. Arbitration is a private process which can be kept confidential and can provide for the quick, practical and economical settlement of disputes. The process is flexible and can be adapted to meet the needs of parties and the circumstances of their transaction."[30]

The arbitration process is often preceded by evidence gathering, and, when compared to litigation, the final decision may be kept confidential.[31] The decision of the arbitrator is known as an Award.

Australia has a strong legislative framework for arbitration – federally, the Government has enacted the *International Arbitration Act 1974 (Cth)* (IAA), which implements the United Nations Commission on International Trade Law's *Model Law on International Commercial Arbitration and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*.[32] This legislation formalises the process for arbitration between parties which may be based internationally and allows matters from any jurisdiction to be heard within Australia.

[30] https://acica.org.au/arbitration/

[31] Note that where a matter goes to litigation, the proceedings and judgment of the Court may be public.

[32] United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration, 40 UN GAOR Supp No 17, UN Doc A/40/17 (1985), annex I, 81, 24 ILM 1302 (1985); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('New York Convention').

Each State and Territory has a comprehensive Commercial Arbitration Act which is broadly based on the model laws mentioned above, and which have been designed to allow arbitration in cases of domestic commercial disputes.[33] These pieces of legislation build a strong and clear process for best-practice arbitration, including:[34]

- How and where the arbitration will take place.
- The use of experts to assist the Arbitrator, independent of the parties to the dispute.
- That each party to the arbitration is to be treated equally.
- That an individual can represent themselves or act on behalf on a party without being a qualified and registered lawyer.
- Information relied on during the arbitration can remain confidential, unless either agreed by both parties or upon the decision of the Arbitrator.
- A Court may assist in the taking of statements and evidence and may issue a *subpoena*.
- An Award issued by the Arbitrator is recognised as binding and, on application in writing to a Court, enforceable.
- Awards can only be appealed through the court system where the parties to the dispute have agreed the decision can be appealed, and the court believes the award substantially affects the rights of one of the parties, and that, on the basis of the findings of fact in the award, the decision was obviously wrong.

These domestic legislative instruments seem to be infrequently used and rarely for matters of a relatively small amount. A report on the West Australian legislation, the *Commercial Arbitration Act 2012 (WA)*, which relied on voluntary responses from industry professionals, noted that in the 2016/17 financial year 105 arbitration matters were reportedly undertaken in that State, of which 52 were between domestic parties and 53 between international parties.[35] The average cost of legal fees for the arbitration process was almost $810,000 with a further $250,000 for tribunal costs, witness fees and other associated costs. On average, the value of the claims and counterclaims undergoing resolution in each single arbitration was more than $214 million. However, arbitration can be adapted for lower value disputes and for a far lower cost – and this is being done through various industry codes.

Arbitration sits as a form of dispute resolution similar to Tribunals (covered in the next section) where a binding decision is made by an independent arbitrator, and appeals, where possible, are made through the court system. Importantly for commercial matters, the award of an arbitration decision can be kept confidential.

Arbitration tends to be a more formal alternative dispute resolution option since it offers dispute resolution where the award is legally enforceable, it does not rely on an agreement being made between the disputing parties, and it can be more adaptable to the needs and circumstances of specific industries over a traditional court process but still able to find innovative solutions. For example, the Dairy Code can recognise the unique role of co-operative business models within the industry which require a particular form of arbitration, or a process which could be less suitable for the established court system.

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[33] https://uk.practicallaw.thomsonreuters.com/1-618-2164?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

[34] These examples are taken from the *Commercial Arbitration Act 2010 (NSW)*. Generally, this Act and those in each State or Territory operate on a similar manner and, as noted, are based on the model laws as dictated in the *New York Convention*. However, there are some clauses in each of the Acts which are not included in the model laws.

[35] https://www.francisburt.com.au/waarbitrationinitiative

Australia has a strong and robust framework for arbitration. That it is used so infrequently is curious. Certainly, Australia's arbitration industry has been working to increase the utilisation of the legislated system for international disputes, looking to rival the current Asia-Pacific centres of the industry located in Singapore and Kuala Lumpur.[36] When just over half of the arbitration hearings considered in Western Australia are international matters, this local push seems to have had some success. However, arbitration remains an excellent dispute resolution pathway for small businesses – this is why it has been included in Codes of Conduct such as the Dairy Code. It allows for binding decisions to be made available for lower value disputes at a reasonable cost and in a timely way.

Case study

Sally is determined to reach an agreement with the processor but believes she can do better than the terms they are offering. However, she doesn't want to be seen as too pushy by the processor, as she is reliant on the processor to take the milk from her farm. She has spoken to the Australian Small Business and Family Enterprise Ombudsman again, and they have suggested arbitration, which is an option under the Dairy Code of Conduct. Sally understands that the outcome of the arbitration will be binding on both her and the processor. The ASBFEO assists with arranging the arbitration between Sally and the processor.

Sally has decided to pay for a lawyer to appear with her during the process but has had trouble finding one locally who is experienced with the arbitration process. The lawyer she has engaged is very experienced in dairy farms and payment agreements with processors and has led several other farmers through the arbitration process; however, he lives several hours down the coast and he is an additional expense which Sally was hoping she wouldn't have to incur. Thankfully, Sally kept reasonable notes from mediation and she still has her financial calculations to show the effect the new payment terms would have on her business. The lawyer uses these to arrange his own notes for the arbitration hearing.

The arbitration takes place in Brisbane, so Sally is able to drive up and back in a day, but she needs to pay for accommodation for her lawyer. The processor again arrives at the arbitration with a commercial lawyer to represent them, who this time is a Queen's Counsel.

The arguments through the arbitration process are very similar to the mediation. The arbitrator makes a finding which is an improvement on the conditions which the processor was initially offering. Sally does a quick calculation with her lawyer, and they agree that her business can continue to operate with the new conditions, which will take effect from 1 January 2021.

Tribunals

Tribunals are typically less formal than courts with less onerous processes. Each party pays their own costs and generally costs cannot be awarded against the losing party. For small businesses, tribunals provide a lower-cost alternative to the court system and are intended to resolve issues quickly and efficiently with the matter decided by an independent decision maker.

In their operation, tribunals principally offer a formalised setting of arbitration for a specific matter or range of matters. Specialist tribunals have been created to deal with a specific types of matter, in both the Federal jurisdiction and at the State and Territory levels. A number of these are relevant to small businesses, including the Australian Competition Tribunal, which hears applications for reviews of determinations by the ACCC, and, at the state level, the various civil tribunals such as the

[36] https://www.mondaq.com/australia/arbitration-dispute-resolution/397882/the-arbitration-regime-in-australia-five-years-on

Victorian or NSW Civil and Administrative Tribunal (VCAT and NCAT). Some tribunals, for example NCAT, offer mediation services to divert cases from the formal tribunal process. Importantly for small businesses, tribunals are the main avenue for the resolution of tenancy disputes[37], or for matters relating to tax issues, which are heard in the Federal Administrative Appeals Tribunal (AAT).

Tribunal hearings commonly feature parties representing themselves without the services of a lawyer. This can be enabled through the Tribunal process using plain language documents and the adoption of a more user-friendly approach than courts. However, legal representation is becoming more common at tribunal hearings, with a resulting increases in time and cost.

At the completion of a Tribunal hearing, parties are given a Tribunal Order which the parties are expected to abide by. If a party to a dispute refuses to abide by the Order, the matter must be referred to a court where the Tribunal Order is registered 'over the counter' and is then enforceable. As with court cases, to ensure the Order is complied with enforcement may include police involvement or the garnishing of income among other options. Similarly, if a party wishes to appeal a decision on a point of law, the party can apply to the relevant Court to be heard. Processing an Order or an appeal through the Court system imposes additional time and cost requirements.

The Tribunal system is extremely valuable for small businesses, but the system is restricted first by the fact that generally only matters where a debt has been incurred are heard – for example, where goods have been received but not paid for – and, second, by low value thresholds for these matters that differ between the states and territories. Further, state and territory based tribunals generally only deal with matters where each party is domiciled in the same state or territory, thereby excluding cross-border and international disputes; as such, in our case study, a Queensland based dairy farmer who deals with a New South Wales based processor would be unable to seek a resolution to a dispute in either the Queensland or New South Wales Tribunals.[38]

Case study

Sally had initially considered whether she could take her dispute to a tribunal, however there are several factors acting against Sally: contract disputes can only be heard through the Queensland Civil and Administrative Tribunal where there is a current debt valued less than $25,000; and anyway, because Sally is based in Queensland and her processor is located in NSW, neither the Queensland tribunal nor the NSW tribunal is able to hear her case.

Sally is lucky that she is in an industry with a mandatory prescribed Code of Conduct which has clear conditions for dispute resolution.

The power imbalance between large and small businesses allows large businesses to leverage the legal system to take advantage of small businesses. Typically, where a matter is for an amount less than around $100,000, the costs of launching and maintaining formal court proceedings makes the activity economically unviable for small business. Where the matter is above that value, small businesses still need to consider whether to embark on a formal legal action due to likely costs, extended time frames and risk over outcomes. The costs associated with a Tribunal are typically much less, as it is easier for a party to represent themselves and parties are not open to an order to have them pay the other party's legal costs.[39]

[37] 7% of Australian small businesses had experienced a tenancy dispute over a 5-year period.

[38] See, for example, page 37, https://www.ncat.nsw.gov.au/Documents/ncat_annual_report_2018_2019.pdf

[39] For example, at the Queensland Civil and Administrative Tribunal specific leave must be sought for a party to be represented by a third-party lawyer or solicitor.

Tribunals provide a simple, fair, and equitable way for disputes to be resolved. They tend not to be financially onerous and allow for parties – especially small businesses – to represent themselves, and the use of plain English forms and explanatory material assists in this.

Litigation

Most small business claims are heard in the Magistrates' Court and Local Courts, as these courts generally deal with low value claims: up to $100,000 in NSW, Vic, Qld, SA and the NT; $75,000 in Tasmania; $50,000 in WA; and, $250,000 in the ACT.[40] In the 2017-18 financial year (the latest year for which figures are available), over 90% of civil claims were initiated or lodged in these lower courts.[41] For small businesses that have claims of a higher value, the claims may be heard in district or county courts, and occasionally in the Supreme Court.

It is worth noting that only a small portion of claims lodged in a court proceed to trial. The District Court of Western Australia (WA) reports that during 2019 a total of 4,876 Writs of Summons were finalised with only 176 trials being listed (3.6%) and only 53 cases proceeding to trial (less than 1%).[42] Additionally, a claim is only heard if the court is satisfied that both sides have completed required pre-trial processes and have adequately prepared their evidence for presentation to the court.

In some cases, the court recommends that parties seek resolution of their dispute through another avenue, like mediation, and integrates this process into the formal process. For example, the Magistrates' Court of Victoria generally requires a civil matter to proceed through mediation if the matter is for an amount under $40,000.[43] If a case is heard and one party is dissatisfied with the outcome, they can appeal the decision to a higher court. For example, a case heard in the magistrate's or local court can generally be appealed to the district or county court. Appendix A provides a flow chart outlining how a case proceeds through the court system.

Although court judgments are legally enforceable, if one party does not comply with the outcome, the other party must return to court to seek an 'order to compel'. This can be enforced in a number of ways, for example, enforcement by the police or by the garnishing of income. This process increases the time and cost of litigation.

The amount of time it takes for a case to progress through the court system is variable, as indicated in Table 1.[44] It is important to note that this table does not include time taken in pre-trial processes:

Table 1: On-time case processing indicator, civil cases in Magistrates and District Courts (by %)

2017-18	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Finalised in ≤ 6 months	60.8	74.9	64.9	78.9	59.8	52.9	85.8	94.3
Finalised in ≤ 12 months	96.5	78.3	72.3	83.7	69.6	86.9	95.4	98.0
Finalised > 12 months	3.5	21.7	27.7	17.3	31.4	13.1	4.6	2.0

Note: 'On-time case processing' measures the age of cases finalised in the financial year.

[40] Table 3 in the Appendix includes more detail on the jurisdictional limits of Courts.
[41] Productivity Commission, Report on Government Services, Data Table 7A2, 2019
[42] Page 14, https://www.districtcourt.wa.gov.au/_files/2019_WADC_Annual%20Review.pdf
[43] https://www.mcv.vic.gov.au/civil-matters/resolving-dispute/mediation
[44] Sourced from Productivity Commission, Report on Government Services, Justice data, Part C, 2019, https://www.pc.gov.au/research/ongoing/report-on-government-services

The average civil court fees for lodging an action in Magistrates' and District/County Courts are outlined below in Table 2.[45] Fees for District and County Courts are higher, broadly in line with the amount in dispute:

Table 2: Average civil court fees paid per lodgement in Magistrates and District Courts (by $)

2017-18	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
District/County Courts	2,093	1,684	976	1,163	1,077	-	-	-
Magistrates' Courts	218	232	115	155	142	102	310	10

Note: The average fees collected by courts vary for many reasons and caution should be exercised in making direct comparisons. The introduction of the NT Civil and Administrative Tribunal in 2016-17 resulted in a reduction of civil court fees associated with small claims with the NT Magistrates Court.

Litigants may represent themselves in court but typically engage lawyers to represent them due to the time and expertise needed to meet court procedural requirements. In our consultations, lawyers have noted that litigation provides ongoing engagement between the lawyer and their client, rather than a shorter and, potentially, cost-reduced option such as mediation. They also noted that small businesses were unlikely to 'shop around' to find a less costly service that meets their needs, typically because small business owners have an inherent trust or respect for their particular lawyer. Our consultations also revealed that small businesses have difficulty accessing cost-effective legal services, an issue exacerbated in rural areas where these is less choice.

Small businesses can access advice regarding legal services as follows:

- The Australian Small Business and Family Enterprise Ombudsman assists small businesses to find the most appropriate process to help resolve a dispute and helps guide small businesses through their dispute. The Ombudsman is not empowered to offer general legal advice.
- The Law Society in each state and territory can assist small businesses connect with a lawyer or another professional, such as a mediator. The Law Society can also propose lawyers who may be willing to take on a matter *pro bono* as a community goodwill service.
- Small Business Legal Advice Clinics operated by university law schools do not operate in all jurisdictions and may be disrupted by COVID-19 restrictions (for example, the clinic run through Bond University in Queensland started operating again at the beginning of the third semester in September 2020).[46] They allow small businesses to access advice services and guidance without the expense of a commercial lawyer. Services can include advice on contracts, disputes and debt, options for resolving a problem, and assistance filling in forms.

[45] *Ibid.*

[46] http://www.legalaid.qld.gov.au/Listings/Organisations-directory/Bond-Law-Clinic-Commercial-law-clinic-small-business-legal-advice

Utilising the court system for dispute resolution allows for certainty in a matter – the decision is made independently, through a formal process and is enforceable. However, the process can be long, expensive, and a formal trial is not necessarily the final step in the dispute process. For small businesses in regional settings, they may also be required to travel to a regional or urban centre increasing the time and costs of the process further.

Australian Small Business and Family Enterprise Ombudsman example

The time, cost and risks associated with a small business using formal legal channels to pursue even reasonably "sure" actions means that small businesses need to be cautious of adopting these channels. For example, a small business related to the Ombudsman its experience of using formal legal channels to recover a $300,000 legal claim. In the matter, although there was some appetite for both parties to settle the matter, the court did not require pre-hearing mediation and set the hearing for 3-4 days. The hearing ended up running for eleven days across a 6 month period. In the meantime, various offers to settle the matter were traded. Almost 2 years after the hearing, the judgment came down against the small business.

Due to the time and financial requirements of court proceedings, they typically benefit the party with the greatest resources. This can be particularly harmful for small businesses. Parties with greater resources can increase costs by hiring multiple lawyers, hiring more highly skilled lawyers, and using delaying tactics such as onerous discovery processes, all of which provide an avenue for exhausting less well-financed small business litigants. In addition, since litigation is an adversarial process, it reduces the chance of businesses maintaining working relationships and has the possibility of being saddled with the other party's costs.

A recent improvement for small businesses on costs was the *Treasury Laws Amendment (2018 Measures No. 5) Act 2019* (Cth) that permits a small business to request a 'no adverse costs' order early in a legal dispute involving matters of competition. This order means that the small business does not have to pay the legal costs of the other party if the small business loses. This is beneficial where small businesses are in dispute with a large business as it removes a large perils in court action.

Court proceedings can be a suitable process if a legally enforceable decision is required from a party independent to the dispute – although enforcement of a judgment may still pose another significant hurdle for small businesses. However, it should be the last resort in situations where parties have attempted other dispute resolution options and have been unable to come to an agreement.

In contrast, by empowering the Australian Small Business and Family Enterprise Ombudsman to develop a voluntary scheme of arbitration where the parties agree to be bound by the outcome, the Government would provide a clear path for cost-effective and timely dispute resolution for small businesses that does not expose them to the vagaries of the traditional court system. Such a scheme would provide confidence to small business owners in the event of a dispute that there is an option (should the parties agree) to access a suitable dispute resolution mechanism.

The arbitration process is not intended to replace nor replicate the dispute resolution advice and services offered through the current system of State-based Small Business Commissioners, or this Office. These services offer great flexibility of approach and in agreeing outcomes. Currently, the Ombudsman can refer matters to mediation, but is unable to refer matters to a binding arbitration process, except in the case of disputes arising from the Dairy Code of Conduct. While the majority of cases the Ombudsman currently refers to mediation are successfully resolved, issues can, and do, arise where an outcome requires recourse to the court system for determination, or where one part of a dispute causes a blockage in the mediation process and stops the whole process from proceeding.

Where matters do not reach a resolution through a mediation process, the only current option is to resort to the formal legal system. The Ombudsman should be empowered to refer matters to the arbitration process, where matters are not already afforded arbitration – for example, as they are through Codes of Conduct.

Case study

Fortunately for Sally, a binding arbitration decision means that her dispute with the processor should be at an end. In the event that Sally was unable to seek arbitration or the processor refused to comply (or chose to appeal the outcome), Sally would need to take further steps.

The remainder of Sally's story comes from the unlikely event that the processor appeals the decision. It is important to note that should the Dairy Code not have included arbitration as an option (as, for example, the Franchising Code does not), Sally would have needed to proceed to court following the failed mediation.

Six months after the arbitration, Sally is surprised to receive a call from her lawyer. The processor is appealing the arbitration in court, arguing that the decision contravenes the Commonwealth's *Competition and Consumer Act 2010*. Sally's lawyer believes that the decision of the arbitrator is sound, and that the processor is concerned that her agreement will become a new benchmark for dairy farmers around Australia. The case will be heard in the NSW District Court since the annual value of the contract is above $750,000. Sally will once again need to pay for her lawyer's time, travel and accommodation, as well as her own.

Sally has been unable to speak to anyone at the processor, despite repeated calls and emails. She is concerned about the toll the process is taking on her relationship with the processor, and she is worried the processor might cancel her contract altogether since there isn't another processor nearby. Sally is also personally feeling the weight of the process, and she is considering accepting the original conditions that the processor is trying to get her to accept. However, now that the processor is not returning her calls, she can't even have that discussion, which only increases her concern.

Sally's lawyer informs her that the processor has refused the court's offer of an ADR pathway, arguing that they have already been through it when they tried mediation and arbitration. The hearing is short, with the same arguments presented as previously made. The judge upholds the arbitration decision.

Sally estimates that the process has cost her over $100,000 in fees, lost productivity on the farm, as well as the stress on her mental well-being. The time and money she has spent should have been to improve fences on her property and purchase new milking equipment, but both will be put off until next year. Sally's relationship with her husband has suffered from the stress and time put into the issue. She is still worried about her relationship with the processor and the conditions to be included in her next agreement due in 18 months.

The current system of State and Territory Tribunals offers a natural framework for a non-court based small business dispute resolution process. As mentioned, some States already have the ability to hear inter-business disputes, but only in limited circumstances. The Ombudsman is recommending that the coverage of the various Tribunals be increased and harmonised to a national standard. The types of matters on which the Tribunals can adjudicate should be expanded to include any matter which includes a small business.

For matters outside the tribunal system, a Small Business Claims List in the Federal Circuit Court would provide confidence to small business owners in the event of a dispute that they will be able to access a suitable court-based decision. Since the List would provide for no adverse costs orders, small business owners receive such an order they would not risk being burdened with the other party's costs. The Court should also aim to resolve matters within 60 days of the matter being lodged. This would ensure that a large business could not seek to prolong processes to use its comparatively large resources against a small business and delay the payment of potential damages. This Court list would also be the natural place for financial disputes to be heard which are not covered by the Australian Financial Complaints Authority.

As part of the introduction of the Federal Court Small Business List, the Government should empower the Australian Small Business and Family Enterprise Ombudsman to provide a triage service for small businesses accessing the List. The service should include access to one-hour's subsidised legal advice before lodgement with the Court and another hour after the Small Business has lodged their matter. The service should be modelled on the existing Small Business Tax Concierge to progress disputes efficiently and effectively. The triage service would also help reassure small business owners and provide support as they commence what can be an overwhelming and daunting process.

In order to ensure and efficient and speedy process, it is also important that online registry and dispute resolution services are provided. The province of British Columbia in Canada developed within its Civil Resolution Tribunal an online service for negotiation and resolution of small disputes such as buying and selling goods up to C$5,000 in value, motor vehicle injury disputes up to C$50,000, all property strata disputes, and disputes involving the Not-For-Profit and co-operative and mutually-owned business sectors. That process commences with an online solution explorer that gathers information on the parties in the dispute and the dispute itself, diagnoses problems, and guides parties by providing them with information on legal rights and template documents.

The Civil Resolution Tribunal facilitates online negotiation between the parties, which encourages a timely resolution of a matter. If this is unsuccessful, a case manager is assigned who assists parties in reaching an outcome. Should these steps prove unsuccessful, the final stage of the process involves an independent member of the tribunal making a determination. We recommend that the proposed Small Business Claims List operate in a similar manner.

Supporting the wellbeing of small business owners

Recommendation 6

The funding announced in the 2020 Federal Budget for services assisting the mental wellbeing of small business (NewAccess for Small Business) owners should be made permanent, integrated with dispute resolution processes and reviewed regularly to ensure they are meeting the needs of small business owners. Following engagement through NewAccess for Small Business and where a mental health coach feels it reasonable, a small business owner should via a bulk billed referral from their GP be able to access a Mental Health Treatment Plan with a mental health professional who has experience with small business matters.

Our Phase 1 Report, *Access to Justice: where do small businesses go?,* discussed that one of the main reasons small businesses abandon a dispute is due to the negative impact on their physical and mental health. This was particularly the case for new small businesses. Small businesses reported that financial pressures and the potential for longer hours on top of already high work demands are factors that have the potential to impact the mental health of owners when dealing with a dispute.

The Ombudsman has regularly called for additional support for small business owners experiencing stress as a result of business disputes and difficult trading conditions. In recent months as a result of drought, bushfire, flood and now COVID-19, the Ombudsman has experienced a significant increase in calls to its assistance line from small business owners displaying signs of psychological distress, which has demonstrated a critical need for a tailored early-intervention service to help small business owners deal with high levels of stress.

The majority of mental health initiatives are targeted at larger businesses as they rely on significant infrastructure to implement. For example, employee assistance programs often require implementation by a dedicated section of the business – most normally, the human resources or human services section – due to level of ongoing maintenance and management of the program.

Mental health initiatives for small businesses require a different approach that reflects the challenges they face and their capacity to take action. In this regard, there are a number of online services to assist small businesses develop a mental health plan, for example Heads Up (by Beyond Blue), Business in Mind (managed by the University of Tasmania), and some of the Small Business Commissioners (such as the Victorian Small Business Commissioner's *Small Business Mental Health Strategic Plan* program). However, disputes and dispute resolution processes need their own particular care and attention. As noted above, disputes add an additional level of stress and demands on the mental health and well-being of small business owners.

Mental wellbeing concerns can arise for any number of reasons, but there are some commonalities to those experienced by small business owners; concerns regarding personal assets such as a family home being held as security against a business asset, the welfare and employment status of staff, and additional stress within the family environment are all common causes for mental health issues. It is vital that the emotional and mental wellbeing of a small business owner is considered as important as their financial wellbeing.

The Ombudsman welcomes the funding announced in the 2020 Federal Budget for the NewAccess for Small Business service and is recommending that additional funding be ongoing in future years. A Government funded coaching service will provide the parallel support needed by small business owners as they deal with disputes. Coaching under that service will be provided by professionals who have the experience in helping small business owners. Developed by Beyond Blue, NewAccess

is an early intervention low-intensity cognitive behavioural therapy program, based on the UK's successful Improving Access to Psychological Therapies (IAPT) program. NewAccess supports anyone who is feeling stressed, anxious or overwhelmed about everyday life issues, such as work, study, relationships, finances, health or loneliness. Over the course of six free sessions with a specially trained coach, participants are supported to overcome difficult issues and regain their confidence and are provided with practical tools to manage everyday challenges. Sessions are free, do not require a GP referral or a specific diagnosis, and are delivered flexibly over the phone or videoconferencing.

While Mental Health Treatment Plans are available and can be covered by Medicare, the Ombudsman also believes that following engagement through the NewAccess for Small Business service, and should a mental health coach feel it is reasonable, a small business owner should via a bulk billed referral from their GP be able to access a Mental Health Treatment Plan with a mental health professional who has experience with small business matters. A small business owner can then be referred to a specialist with a more thorough understanding of the issues inherent to this sector.

Australian Small Business and Family Enterprise Ombudsman example

In many of the cases where the Ombudsman offers support, we also offer support to deal with the stresses that a small business person is undergoing when dealing with a dispute. This can be as simple as checking that a person has personal and medical support, but it can also mean referral to organisations such as Beyond Blue and Lifeline when experiencing elevated levels of stress.

A typical real example that we encountered was a franchise dispute relating to a breakdown in relationship between franchisor and franchisee. It is unclear how the relationship got to the point that it did but the franchisee was suffering severe mental health issues and threatening self-harm.

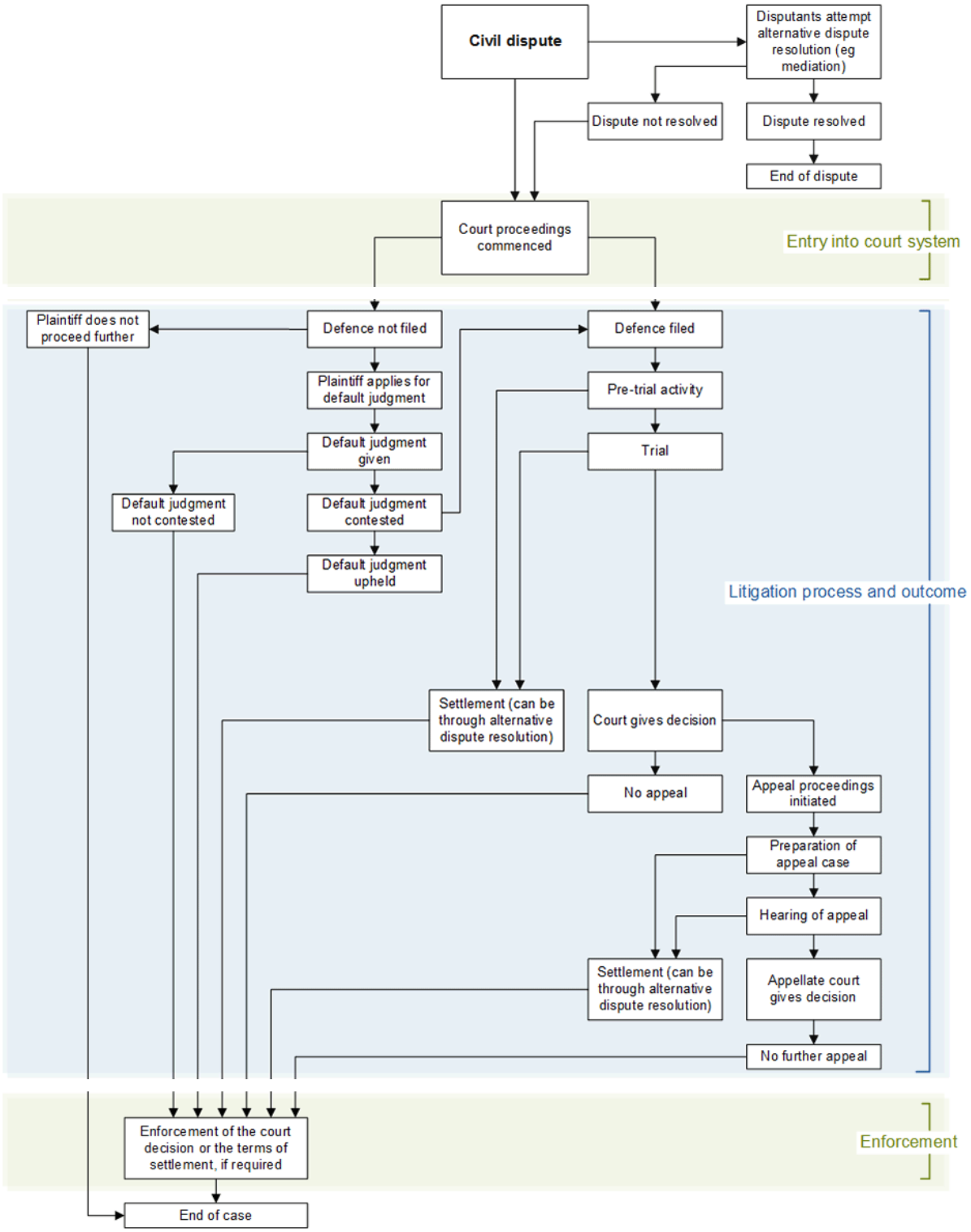
The franchisor, who held the lease, responded by restricting access to the premises by the franchisee to seek to minimise the possibility of self-harm by the franchisee on-site. This intensified the existing issues and meant that trust was lost between the parties who could not then agree on how to conduct a stocktake of inventory held by the franchisee. The franchisor, being unable to conduct the stocktake, invoiced the franchisee for the stock calculated to be in his possession.

The parties remained in dispute about the value of the inventory invoiced, access to the franchise and the payment of commissions for work done. Unable to progress the dispute directly, the franchisor issued a formal Statement of Claim through the legal system for the inventory (around $90,000).

The franchisee issued a Notice of Dispute relating to these issues and, with the agreement of both parties, the matter was progressed to mediation. A few days before mediation was due to occur, the franchisor withdrew from mediation including due to the perception that the franchisee's mental health might deteriorate further as a result of the mediation. However, the mediator confirmed that the franchisee had professional support and was able to bring both parties back into mediation.

Appendix: Additional information

Figure 2: Process flow through the civil justice system[47]



[47] https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/justice

Table 3: State and Territory court jurisdictional limits

	Magistrates'/Local Courts ***Claim limits:***	**District/County Court** ***Hear appeals and jurisdiction for claims:***	**Supreme Court** ***Hear appeals and unlimited jurisdiction for claims, noting:***
NSW	Up to $100,000	Up to $750,000 (or greater with party consent)	Generally over $750,000
Victoria	Up to $100,000, with most defended civil matters less than $40,000 being referred to the Dispute Settlement Centre of Victoria, except for matters at the Melbourne Magistrates Court	Unlimited although most cases in the Commercial Division deal with claims between $100,000 and $500,000	Generally over $200 000
Queensland	Up to $150,000 with minor civil disputes lodged with the Queensland Civil and Administrative Tribunal	Between $150,000 and $750,000	Over $750 000
WA	Up to $75,000	Up to $750,000	Over $750,000
SA	Up to $100,000	Unlimited claims for general and personal injury	Unlimited jurisdiction for general and personal injury
Tasmania	Up to $50,000 (or greater with party consent)	Note: There are no district/county courts in Tasmania, ACT or NT	Generally over $50 000
ACT	Between $25,000 and $250,000 (ACT Civil and Administrative Tribunal has jurisdiction for small claims up to $25,000)		Generally over $250,000
NT	Up to $100,000		Generally over $100,000

Australian Government

Australian
Small Business and
Family Enterprise
Ombudsman