



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman



Access to Justice

Where do small businesses go?

November 2018

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ISBN: 978-1-76051-603-1

Contents

Foreword	4
The survey	5
Highlights	6
Key outcomes overall	7
A closer look at resolving serious disputes	12
The factors that impact disputes	14
Size of the business	14
Industry sector	14
Maturity of the business	15
Location of the business	16
International comparison	18
Hong Kong	18
United Kingdom	18
New Zealand	19
United States of America	19
Appendixes	20
Appendix A: Terms of Reference	20
Appendix B: Survey questions	21
Appendix C: Consultations	24

Foreword

Small businesses need dispute resolution that is accessible, timely, affordable and where possible, capable of maintaining business relationships. Recent inquiries by this office, including Small Business Loans, Payment Times and Practices and Affordable Capital for SME Growth, identified gaps in access to justice.

There are many pathways to resolve disputes in Australia – free services such as an ombudsman, small business commissioners and legal aid, to formal processes such as arbitration and mediation through to our court system.



Small businesses, those that employ less than 20 full time equivalent employees¹, account for over 97% of all Australian businesses – almost 2.2 million entities² – and contribute 35% of GDP.³ They experience asymmetry of power when interacting with larger businesses and government as they have comparatively less financial and human resources for protracted dispute resolution.

This report covers phase one of our Access to Justice Inquiry. In this phase we surveyed 1,600 businesses across Australia and opened the survey online for one month. Our aim was to gain an understanding of where small businesses go for advice and, when they escalate a dispute, what pathways they choose. If a dispute was escalated, did the cost in time and money outweigh the benefits to the small business?

This report has informed the next phase of the Access to Justice inquiry – phase 2 will look at the court systems, explore emerging ideas for streamlining processes and make recommendations to improve access to justice for small business owners.

A handwritten signature in blue ink that reads "Kate Carnell". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman

¹ Australian Bureau of Statistics, 8155.0 Australian Industry, 2016-17

² *ibid.*

³ Australian Bureau of Statistics, 8155.0, Table 5, June 2017

The survey

We surveyed 1,600 businesses with weighted sample sizes.

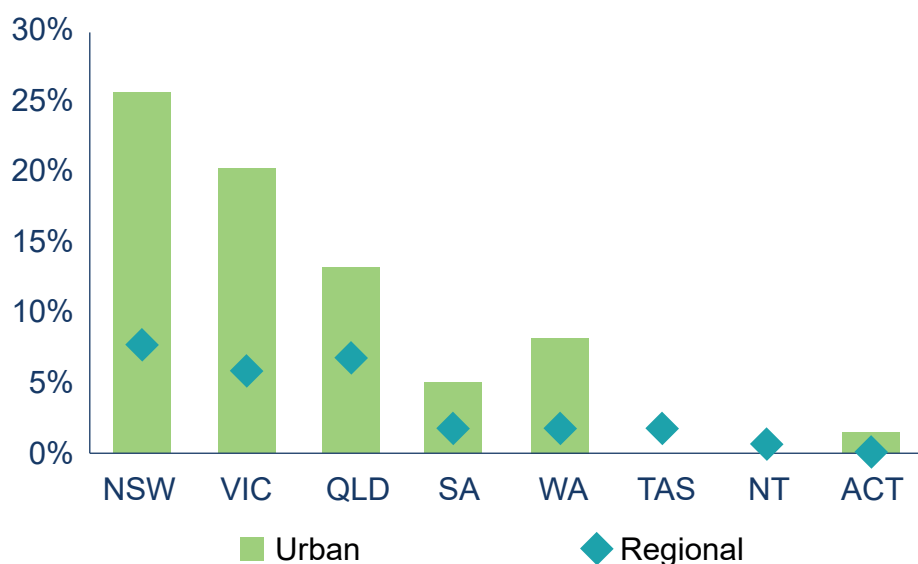
- 88% were small businesses with less than 20 employees.
- 3 out of 5 had been in business for 10 years or more.
- 16 industry sectors were represented with retail representing 25.5%, construction 12.5% and manufacturing 7.6%.
- 73% were from metropolitan locations, 27% from regional locations.

ABS statistics

	Urban	Regional	Total
NSW	554,166 (26%)	163,023 (8%)	717,189 (33%)
VIC	435,212 (20%)	130,032 (6%)	565,244 (26%)
QLD	278,024 (13%)	143,000 (7%)	421,024 (20%)
SA	105,161 (5%)	37,713 (2%)	142,874 (7%)
WA	175,137 (8%)	48,407 (2%)	223,544 (10%)
TAS	-	36,758 (2%)	36,758 (2%)
NT	-	13,970 (1%)	13,970 (1%)
ACT	26,243 (1%)	-	26,243 (1%)
Total	1,573,943 (73%)	572,903 (27%)	2,146,846 (100%)

Post-weighting distribution

	Urban	Regional	Total
NSW	413 (26%)	121 (8%)	535 (33%)
VIC	324 (20%)	97 (6%)	421 (26%)
QLD	207 (13%)	107 (7%)	314 (20%)
SA	78 (5%)	28 (2%)	106 (7%)
WA	131 (8%)	36 (2%)	167 (10%)
TAS	-	27 (2%)	27 (2%)
NT	-	10 (1%)	10 (1%)
ACT	20 (1%)	-	20 (1%)
Total	1,173 (73%)	427 (27%)	1,600 (100%)



Highlights

From the 1,600 businesses surveyed:

- Over 9 out of 10 businesses will talk to the other party before escalating a dispute.
- But only 8 out of 10 will talk to government before escalating a dispute and are more likely to escalate all disputes with government.
- Disputes with not-for-profits were least likely to be escalated.
- Payment times remain the biggest cause of disputes (44%)
 - either the full amount was not paid (26%)
 - or payment was made late (18%).
- 3 out of 5 businesses with a dispute first sought advice from a lawyer (62%).
- Almost 1 in 5 spoke to another business owner or manager for advice (18%).
- 22% have been involved in a dispute in the last 5 years:
 - almost 9 out of 10 disputes were business-to-business (89%)
 - about 1 in 20 disputes were business-to-government (6%)
 - there was an equal split between disputes with customers (45%) and disputes with suppliers (44%).
- 1 in 3 disputes were not escalated through a formal process because:
 - it was possible to resolve the dispute another way (41%) or
 - the expected costs were considered to be more than the potential gain (15%) or
 - the business did not have time to follow up the dispute (11%).

Formal pathways:

- 60% agreed the dispute was dealt with fairly.
- 50% considered the amount of time and effort required was unreasonable.
- The average cost of the process was over \$130,000.
- 2 out of 3 business relationships ended.

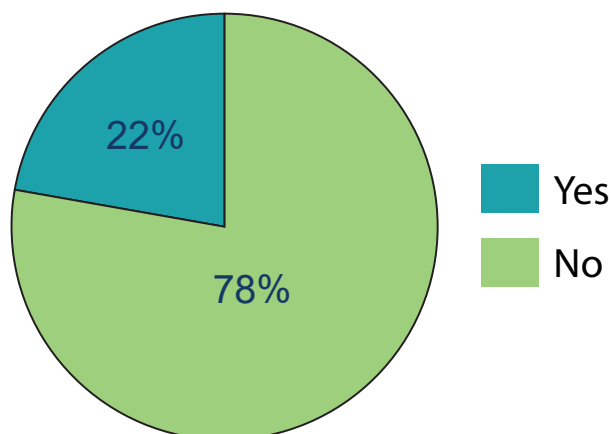
Key outcomes overall

How many businesses experienced a dispute?

1 in 5 businesses (22%) experienced a dispute in the last 5 years.

Any business disagreement in the last 5 years?

Base: all respondents (n=1600)

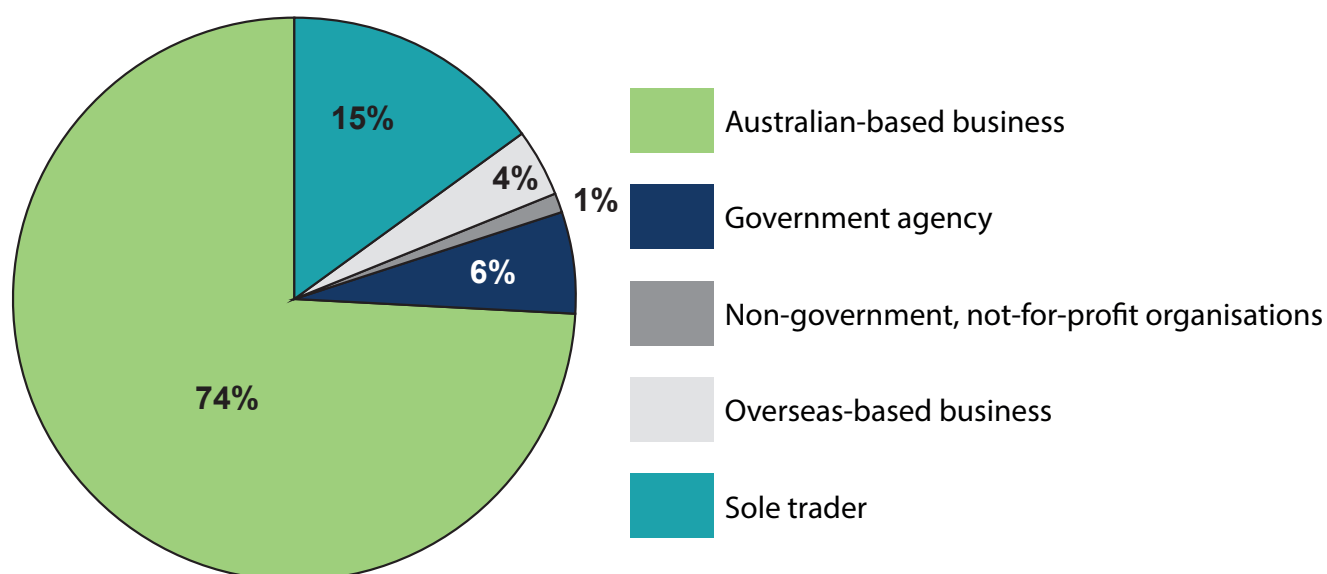


Who were the disputes with?

Almost 9 out of 10 disputes were business-to-business.

Which of the following best describes the other party?

Base: respondents who were involved in at least one business disagreement in the past 5 years (n=355)



What were the disputes about?

A survey by the former Department of Industry, Innovation, Science and Research in 2010, found the highest cause of disputes was payment for goods and services.

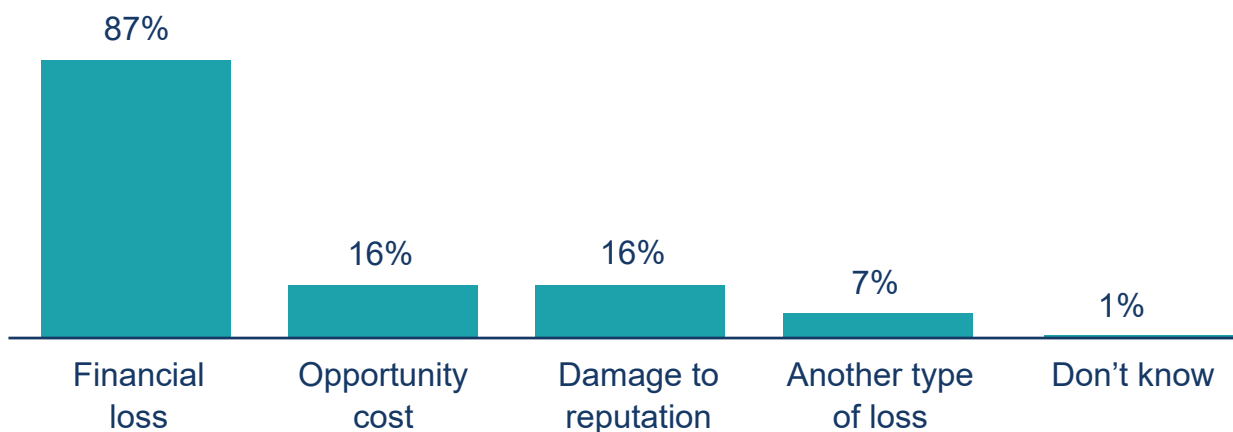
While our survey sought more detailed questions, we found that payment issues remain the biggest cause of disputes (44%) – either the full amount was not paid (26%), or there was late payment (18%).

What was the impact of the dispute?

Financial losses were the greatest impact followed by opportunity cost and damage to reputation.

Direct impact of disagreement

Base: respondents who were involved in at least one business disagreement in the past 5 years (n=355)



Who did businesses go to for advice?

- The first thing 9 out of 10 businesses did was to speak with the other party to try and resolve the dispute.
- For those that sought advice outside the business relationship 2 out of 3 (62%) sought advice from a lawyer or other form of legal service.
- 41% escalated to a formal dispute resolution process.
- 15% were able to resolve the dispute themselves.

Sources of advice

Base: respondents who sought advice from anyone outside their business (n=232)

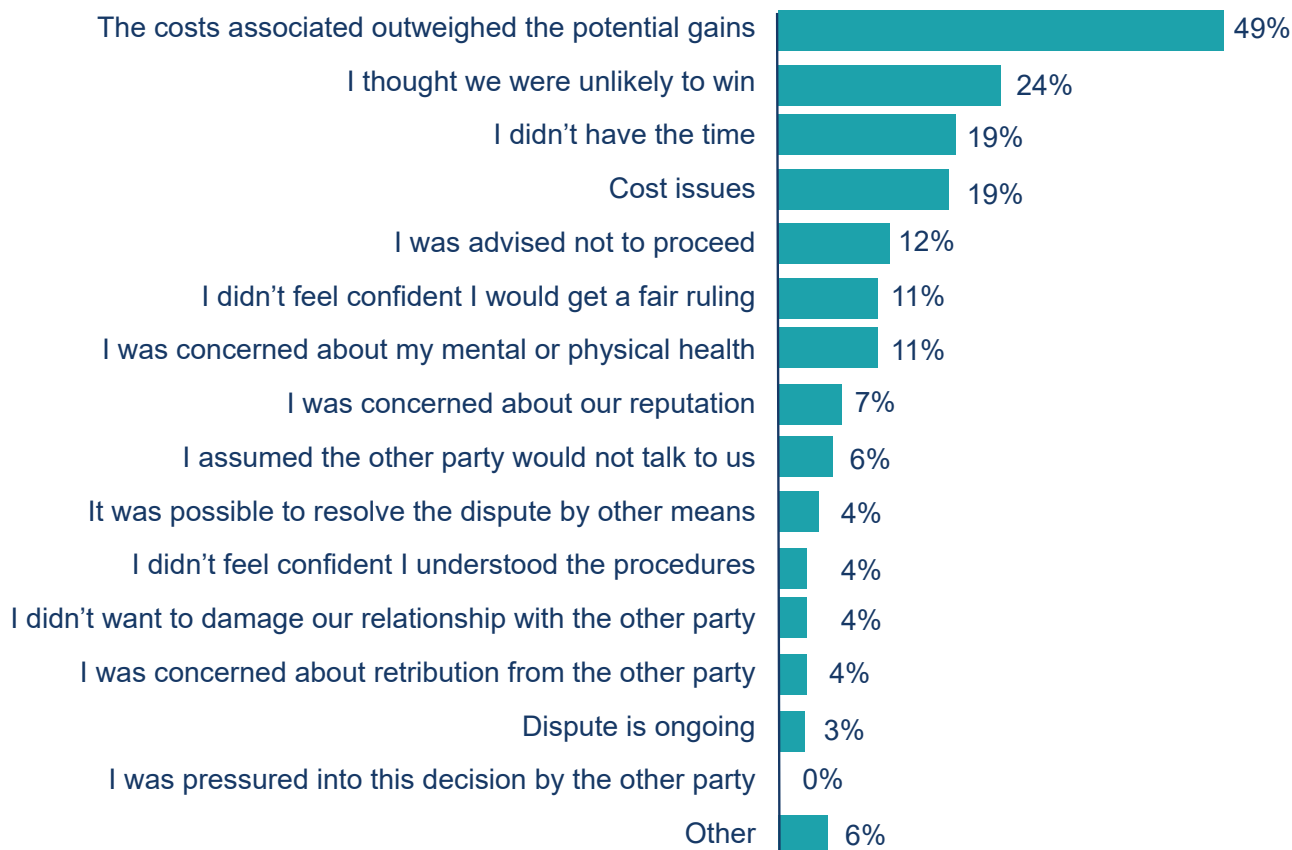
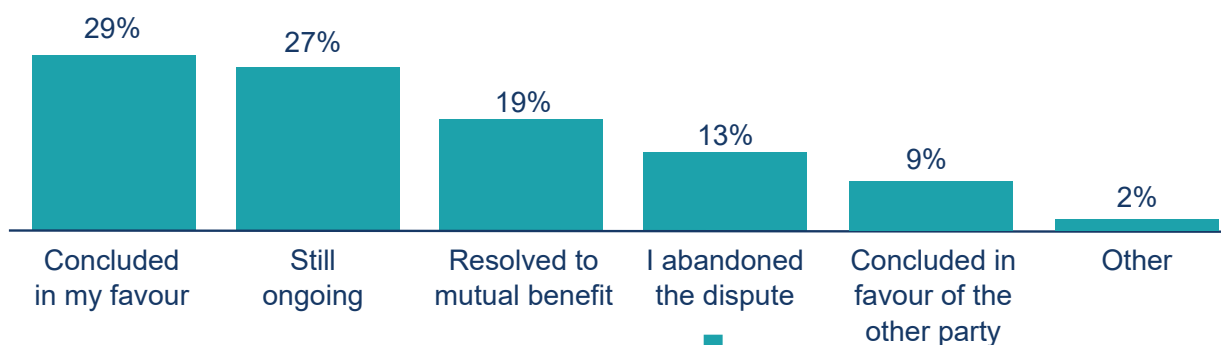


What happened to the disputes?

- Of those who had escalated a serious dispute, 57% had been resolved – 29% in favour of the business.
- 13% of disputes were abandoned mid process with 68% saying this related to costs in general, or expected costs to outweigh potential gains.

Current status of dispute

Base: respondents who were involved in at least one business disagreement in the past 5 years (n=355)



What happened where the other party was a government body?

Where the dispute was with a government agency, businesses felt they were unlikely to win and did not pursue through formal mechanisms.

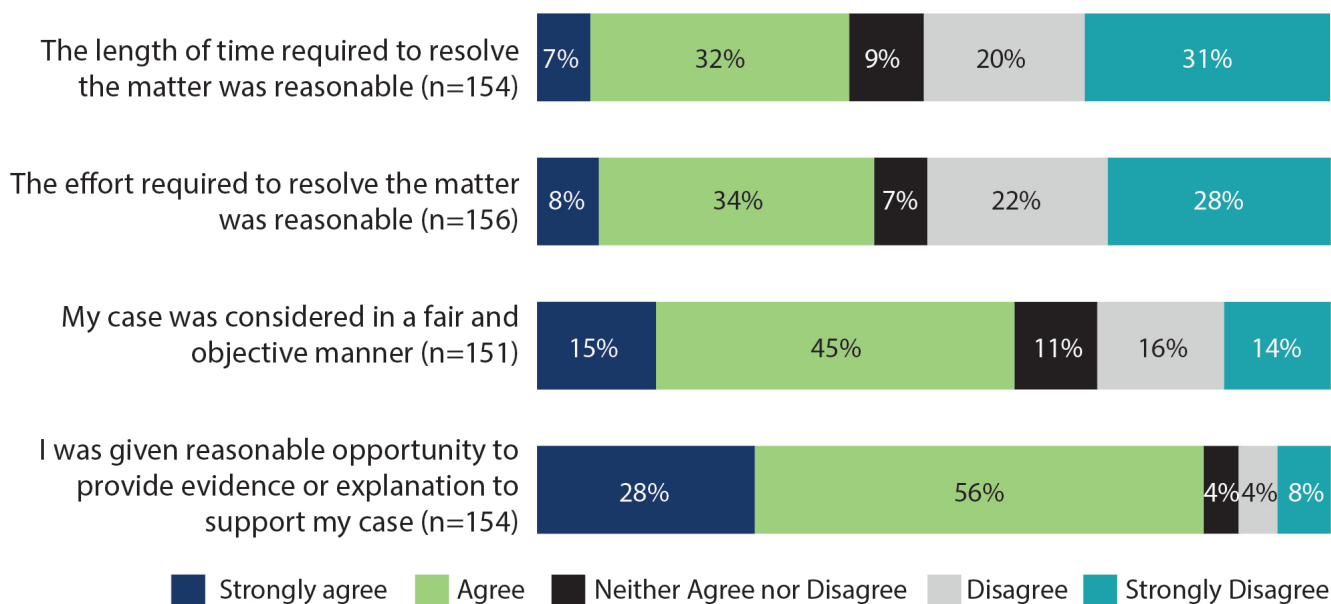
What were your reasons for not escalating through a formal mechanism?	Overall	Govt agency
I thought we were unlikely to win	28%	100%
Dispute is ongoing	27%	
I was concerned about our reputation	22%	90%
It was possible to resolve by other means	22%	10%
I didn't want to damage my relationship with the other party	20%	90%
The cost outweighed the potential gains	16%	
I didn't have time	13%	
I was unable to afford the costs	11%	90%
I did not feel confident I understood the procedure	11%	
I was concerned about retribution	11%	

A closer look at resolving serious disputes

Views on the time and effort to resolve a serious dispute

Half of all businesses that resolved serious disputes **did not** agree that the time and effort involved was reasonable.

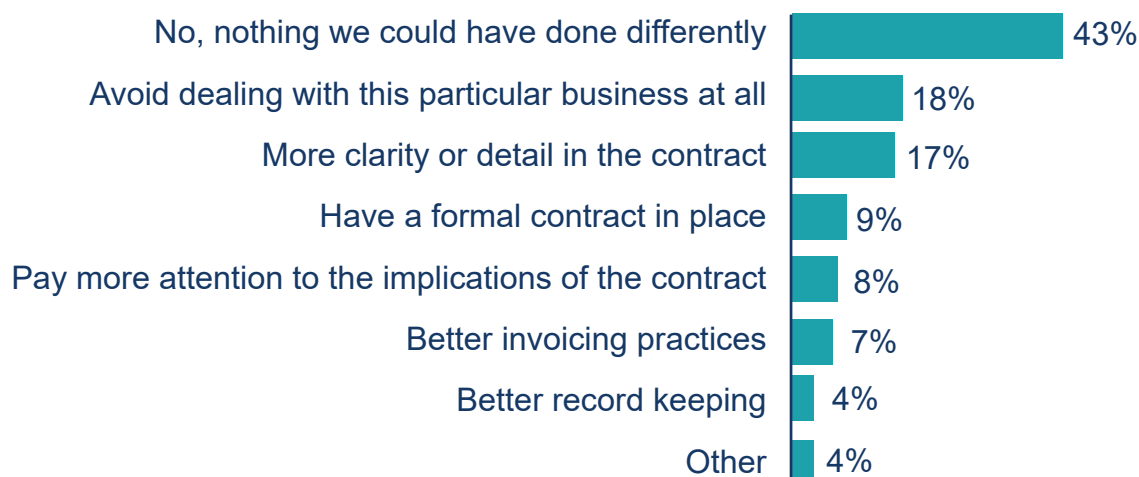
Time and effort involved



Would you change how you handle a serious dispute?

Disappointingly, 43% of businesses consider they can not make changes to prevent similar disputes in the future.

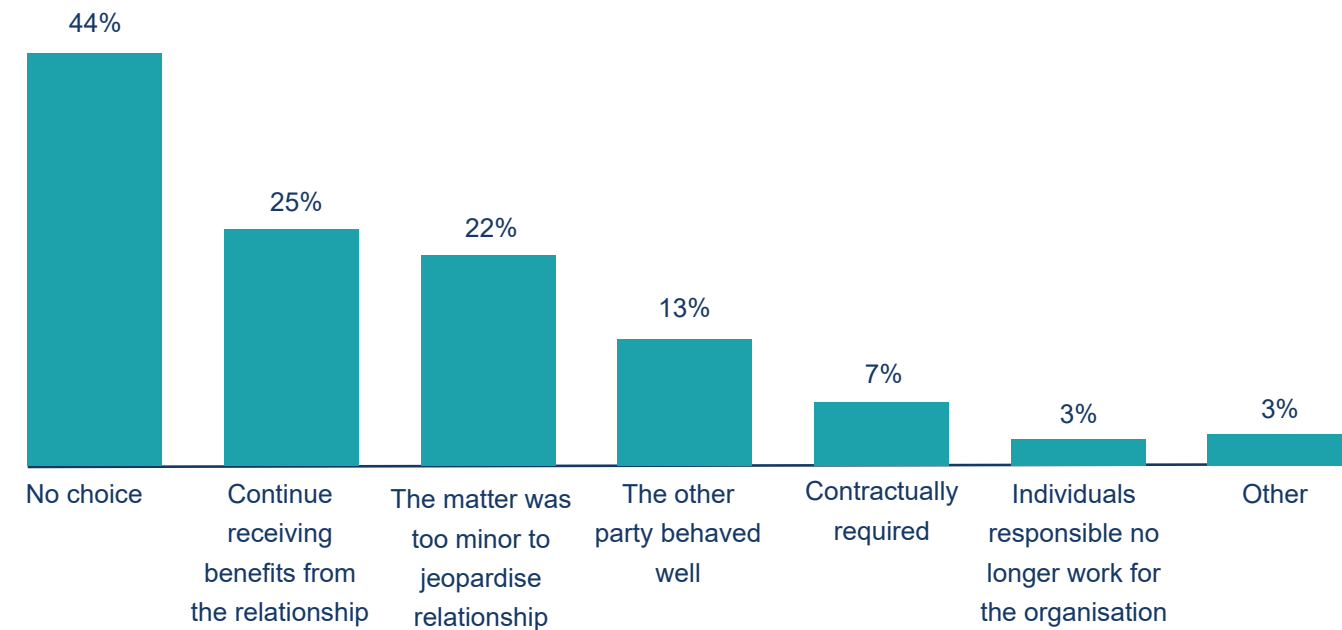
Doing things differently to prevent disputes



Some businesses (18%) would avoid future dealings with the other party.

However, nearly half would continue the business relationship because they believe they have no alternative.

Reasons for continuing to do business with other party



The factors that impact disputes

Size of the business

Our survey indicates that as business size increases, they face a higher incidence of disagreements.¹ For example, larger businesses – those employing more than 19 people or with revenues greater than \$3 million – face nearly double the number of disagreements compared to sole traders (those with revenue of less than \$250,000).

When disagreements occurred, only 42% of sole traders sought advice, compared to 75% of larger businesses.

For the majority of disagreements, larger businesses (67%) were able to resolve the dispute without escalating it to a formal process, compared to the overall average of 41%.

Industry sector

When we look at responses by industry sector, greater variances emerge.

At least one dispute

Across all sectors (1,600 businesses surveyed), 22% had a dispute over the past five years.

Of those contacted from the Mining sector, nearly 65% had experienced a dispute over the past five years (almost three times the survey average).

Multiple disputes

Across all sectors, of businesses who had experienced a dispute, almost half (49%) had experienced multiple disputes.

Two sectors were well above this average. Information, Media and Telecommunications, had 100% who had experienced multiple disputes. In Agriculture, Forestry and Fishing, 75% experienced multiple disputes.

Cause of disputes

Across all sectors, the most common cause (44%) related to payment issues.

In the Mining sector, over 70% of disputes related to refusal to pay the full amount charged. In Education and Training, 75% of disputes related to dissatisfaction with the quality of goods and services delivered.

¹ The survey research indicates a business is involved in on average one disagreement over 12 months.

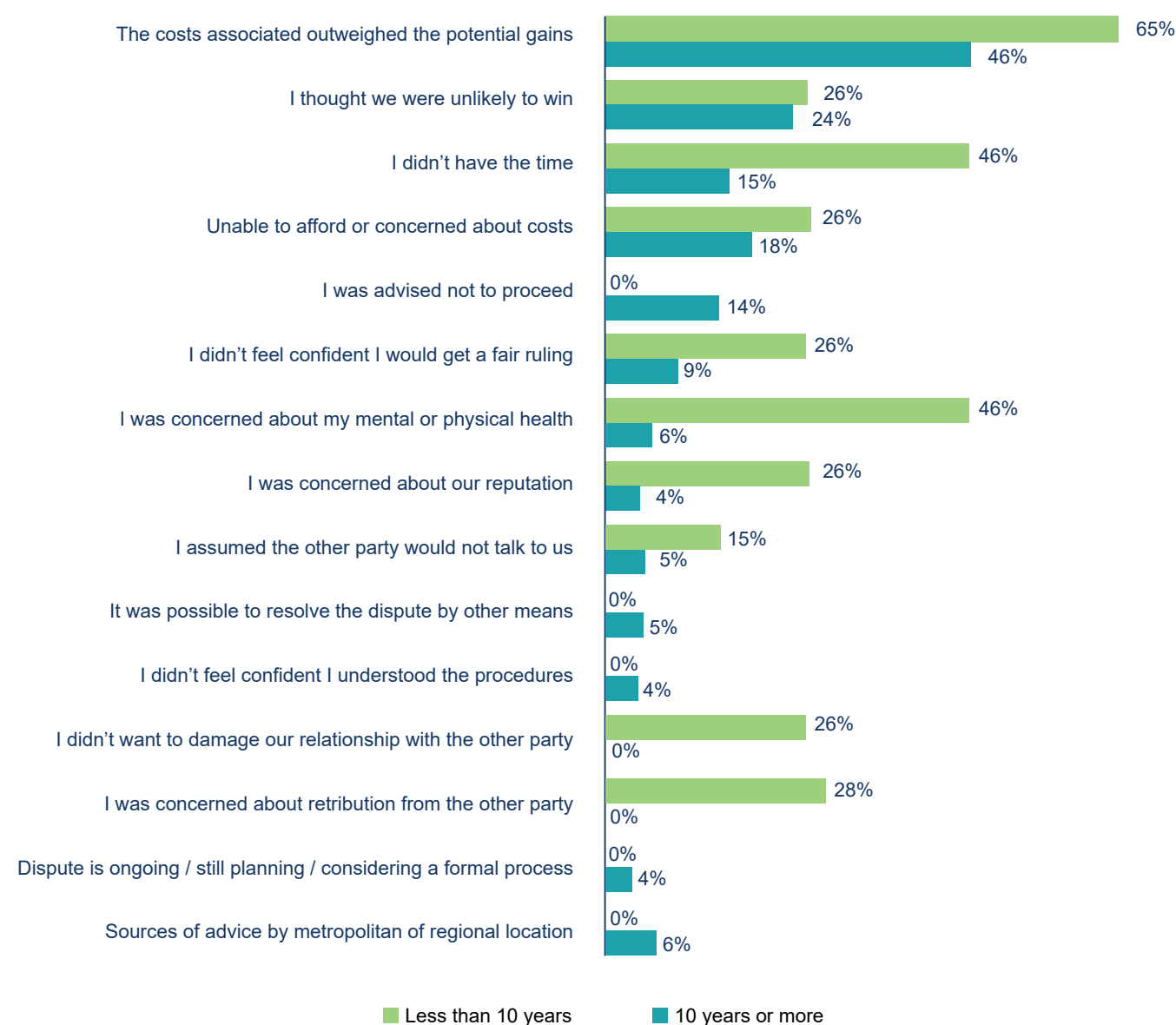
Maturity of the business

Small and young businesses (less than 10 years old) experience more disputes over quality – over 50% of disputes relate to dissatisfaction with the quality of goods/services. In comparison, 34% of mature businesses (over 10 years old) experience disputes over quality.

Young businesses are more likely to speak to another business owner (25%) or industry association (19%), compared to mature businesses (12% and 11% respectively).

There are marked differences as to why younger business will abandon a dispute compared to mature businesses. Costs, mental and physical health, followed by time constraints were the main reasons younger business abandoned disputes. Preserving relationships and avoiding retribution were significant reasons too.

Reasons dispute abandoned by business age



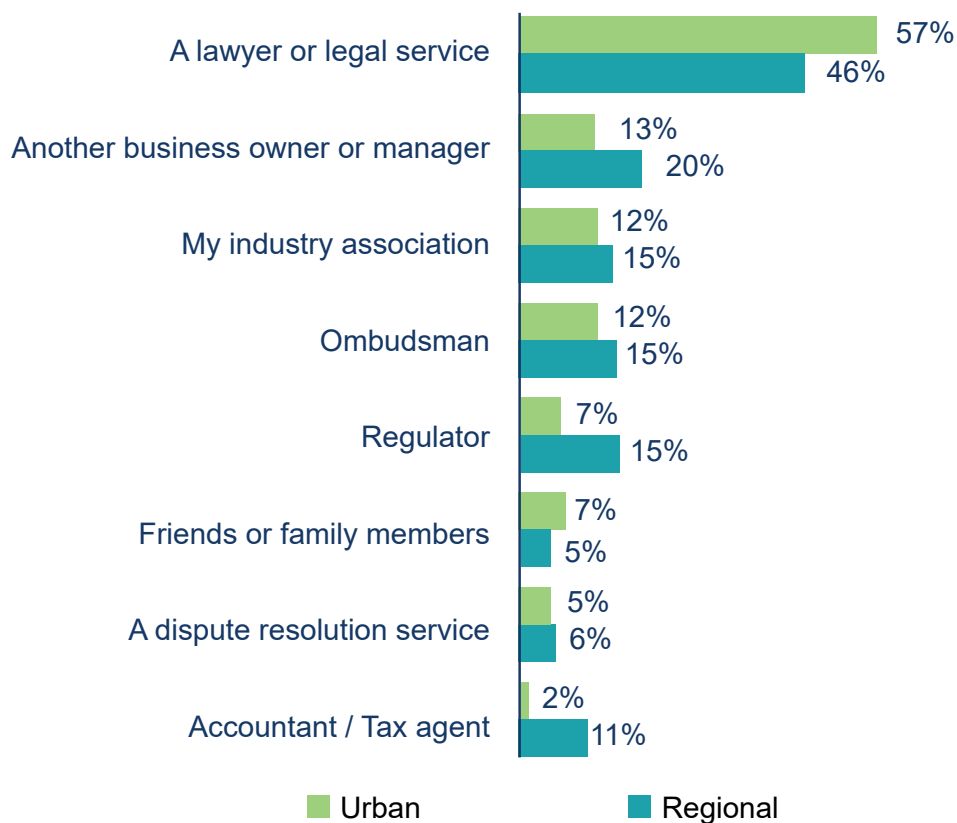
Location of the business

Regional businesses face more difficulty in varying contract terms – 59% were unable to vary terms compared to 48% of urban business.

They also have a higher incidence of late payment disputes (21% in regional areas compared to 16% in urban locations).

Regional businesses place more reliance on advice from another business owner, their industry association, ombudsman or regulator than do their urban counterparts. Similarly, they rely more on advice from their accountant or tax agent (11%) compared with urban business (2%).

Sources of advice by metropolitan or regional location



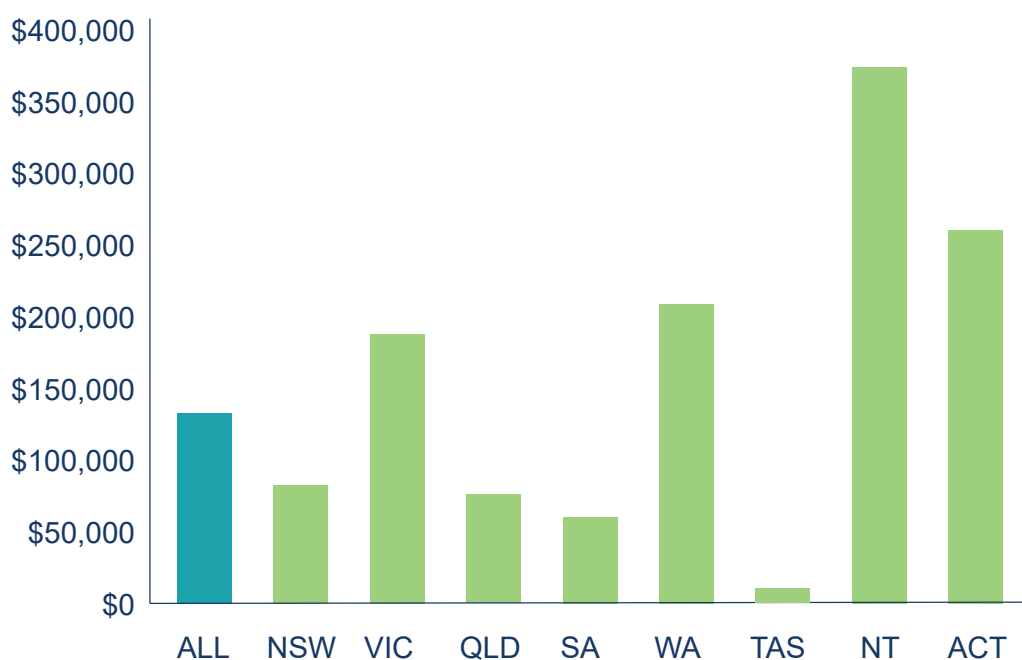
The services used across states varied, with Northern Territory businesses the least likely to seek advice from a lawyer and the most likely to call a regulator.

Sources of advice across states and territories

	ALL	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
A lawyer or legal service	44%	41%	45%	53%	32%	41%	33%	8%	58%
Ombudsman	11%	17%	2%	7%	23%	10%	22%		8%
My industry association	7%	5%	14%	5%	7%	6%		8%	
Another business owner/manager	7%	11%	5%	7%		8%		15%	
Regulator	7%	6%	10%	7%	5%		11%	23%	
A dispute resolution service	5%	5%	10%	4%					
friends or family members	3%	3%	5%		13%				8%
Internet search	2%	1%			7%	8%		8%	
Accountant/Tax agent	1%	1%		3%	3%	2%	22%	8%	
Other government agency			2%		3%	4%		8%	8%
Australian Taxation Office					7%				
Local Council						4%			
Chamber of Commerce									
Bank / finance providers									

There were also significant differences in the costs of pursuing disputes, with the highest cost being incurred in the Northern Territory (\$370,667), followed by the Australian Capital Territory (\$256,492).

Costs to pursue disputes across states and territories



International comparison

Many jurisdictions have a range of options available to parties to enable them to settle disputes. Following is an overarching summary and in phase 2 we will analyse the effectiveness of these systems.

Hong Kong

The Mediation Information Office (MIO) is part of the Hong Kong Judiciary.² Through information sessions, MIO assists the public to understand the nature of mediation, how it can help parties resolve their disputes and directs parties to professional mediation bodies. Since establishment in 2010, 38% of the mediated cases resulted in agreement – taking on average five hours to reach full agreement.³ The average cost of mediated cases is HK\$17,000 per case (approximately AU\$2,920).

United Kingdom

The National Mediation Hotline is operated on behalf of the Ministry of Justice by a private provider. It aims ‘to provide members of the public with a simple, low cost method of resolving a wide range of civil disputes’.⁴ Helpline operators explain the principles of mediation and answer general questions about mediation. Operators can put parties in contact with a mediation organisation, which then assigns a local, professional mediator to the matter if required. Fees for the mediation service are linked to the amount of money claimed. The lowest fee is £50 plus Value Added Tax (approximately AUD\$90) and is payable by each party for one hour of mediation.

The UK has a Financial Ombudsman Service (FOS),⁵ which attempts to resolve the dispute informally. The service is free of charge for the applicants. The FOS contacts the opposing party to hear their opinions on the dispute and subsequently recommends a resolution. Most disputes are settled without having face-to-face meetings between the conflicting parties. If the informal approach does not resolve the dispute, the FOS makes further enquiries, examines documents and then delivers a final decision. This decision by the Ombudsman becomes legally binding on the parties involved. The dispute cannot be reviewed by another ombudsman. If taken to court, the review is limited to FOS processes for decision and not the merits of the case itself.⁶

2 Mediation Information Office – mediation.judiciary.hk/en/mio.html

3 Mediation Information Office, *Mediation Figures and Statistics*, mediation.judiciary.hk/en/figures_and_statistics.html

4 Civil Mediation Council – civilmediation.justice.gov.uk/

5 Note: the Australian Financial Complaints Authority commenced operations on 1 November 2018

6 Financial Ombudsman Service – finobs.syn-finity.com/faqAgent.html?search=decision

New Zealand

New Zealand's Dispute Tribunal is a small claims mechanism with national effect. Its jurisdiction covers small claims disputes up to the value of NZ\$15,000 (approximately AUD\$14,000) in areas such as contracts, payment and damage or loss of property. For disputes above this amount, between NZ\$15,000–200,000, the District Court is the next step. Disputes that are larger or more complex need to be taken to the High Court. Work is still being undertaken to better assist dispute resolution for small businesses.

If disputing parties cannot reach an agreement on their own, the referee will look at the law and the facts of the dispute before deciding what is fair. Rulings made by the tribunal referee are legally binding on the parties concerned.

United States of America

The American Arbitration Association (AAA), a not for profit organisation,⁷ contains detailed rules on processing various issue-specific or size-specific disputes. With disputes from the construction industry, for example, if the claim does not exceed US\$10,000 it is resolved by submission of documents. This does not require a physical meeting. The AAA also provides a fast-track arbitration procedure where the claim does not exceed US\$75,000. A preliminary telephone conference is held among parties within 10 days of an arbitrator being appointed followed by hearings, conducted in a single day with the judgement delivered no more than 14 days after the hearing.

⁷ American Arbitration Association – www.adr.org/

Appendixes

Appendix A: Terms of Reference

In the first phase of the inquiry we will examine:

- the nature and incidence of small business disputes in Australia, identifying patterns and trends
- the level of awareness of options available to small businesses, particularly of alternative dispute resolution (ADR)
- actions taken by small businesses when faced with a dispute
- reasons for decisions made throughout the dispute resolution process
- developments and trends in similar jurisdictions overseas.

Appendix B: Survey questions

Orima Research conducted the survey. Researchers called 1600 businesses and worked through the survey questions. These are the questions only, not the logic to move through the question depending on an answer.

A: Incidence of disputes and disagreements

We would like to gauge your experiences in your dealings with other organisations in Australia and overseas. In particular, we are interested in any situations you have come across where there has been a business disagreement with another business, not-for-profit organisation or government agency. This includes disagreements where you have initiated a formal dispute resolution process, **and** those where you decided not to proceed formally.

1. Has your business been involved in a **business disagreement** with another **organisation** at any time in the **past 5 years (this includes overseas organisations)**?
2. How **many** business disagreements has your business been involved in, over the past five years?
3. **Hypothetically**, if you **were** to have a business disagreement with another organisation, where would you first go for advice?
4. For any of the disagreement/s you have had, did you seek **advice** from anyone outside your business about how to proceed?
5. What sources did you seek advice from?
6. For any of the disagreement/s you have had, did you talk to the other party in the dispute before escalating further?
7. For any of the disagreement/s you have had, how many did you escalate further by approaching a third party?
8. What third parties did you make use of to help resolve or mediate the dispute disputes?
9. What factors influenced your decision(s) not to start a formal dispute resolution process?
10. Why did you feel you were unlikely to win [or get a fair ruling]?
11. You mentioned that you chose not to proceed with a formal process due to cost. How much did you think it would cost?

B: Most serious disagreement

For the next few questions I would like you to think about what you consider was the **single most serious or significant business disagreement or dispute** you have had with another party in the past five years.

12. Which of the following best describe the nature of the disagreement?
13. If you had done nothing about this disagreement, what would have been the direct impact on your business?
14. After you noticed the problem(s) with the contract, were you able to come to a mutual agreement with the other party or vary the contract?
15. Who do you think was at fault in this disagreement?

16. I would like to read out a number of statements about how you might have thought about the matter or proceeded with the matter. Please tell me which of the following would best describe the situation on your most serious incident?
17. What sources of advice outside your business did you approach during the process including when you were first deciding whether to progress the matter?
18. Of these sources, which one did you consult or approach **first** in this particular disagreement?
19. How helpful was this initial advice?
20. Of the formal dispute mechanisms you made use of, which was the **last** one you used?
21. Which of the following best describes the decision to try resolve the dispute this way:
22. Why did you decide to escalate the matter to this point?
23. What were your reasons for **not** escalating the disagreement, or making use of a formal mechanism? Probe further with options below]
24. Why did you feel you were unlikely to win [or get a fair ruling]?
25. You mentioned that you chose not to proceed with a formal process due to cost. How much did you think it would cost?
26. Which of the following describes the current status of this dispute?
27. Why did you abandon the dispute?

Considering **all** the steps you took to resolve the dispute ...

28. Would you be able to place an approximate **total dollar value** on the cost to your business in addressing the matter (so far)? This includes out-of-pocket expenses, time spent, opportunity cost, and any other monetary disadvantage.
29. And weighing the **total cost** against the benefits of resolving the dispute, would you say...
30. Knowing what you now know, what would you have done differently in handling this disagreement, or what are you likely to do differently, **handling similar disagreements** in future?
31. Knowing what you now know, is there anything you or your business could do differently in order to **prevent similar disagreements from arising** in the future?
32. Considering the formal mechanisms you experienced, to what extent do you agree or

disagree that:

33. All things considered, how satisfied were you with the formal proceedings you

	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disagree	Don't know / NA
The length of time required to resolve the matter was reasonable	1	2	3	4	5	6
The effort required to resolve the matter was reasonable	1	2	3	4	5	6
My case was considered in a fair and objective manner	1	2	3	4	5	6
I was given reasonable opportunity to provide evidence or explanation to support my case	1	2	3	4	5	6

experienced?

34. How likely are you to do business with the party you had a disagreement with in the future?

35. Why do you say that? Benefits from the relationship in the future?

C: About your business

36. Including yourself, how many full-time-equivalent staff does your business employ?

37. Which of the following revenue brackets does your business fall into based on the financial year July 2016 to June 2017? This is gross annual income from all sources before tax.

38. How long has your business been in operation?

Appendix C: Consultations

Name of organisation grouped by industry/sector

Name of organisation	Sector
ANU College of Law	Academia
Credit and Investments Ombudsman	Government
John Curtin Law Clinic	Academia
LawAccess NSW – Division of NSW Department of Justice	Government
Melbourne & UNSW Law School	Academia
NSW Law and Justice Foundation	Statutory body
NSW Law Council	Government
NSW Small Business Commissioner	Government
Office of the Franchising Mediation Advisor	Government
Queensland Small Business Commissioner	Government
Treasury – Small Business Policy	Government
University of Canberra Small Business Legal Clinic at Legal Aid ACT	Academia
Victorian Small Business Commissioner	Government
Western Australian Small Business Commissioner	Government



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ISBN: 978-1-76051-603-1