

Our reference:  
Your reference:

30 August 2013

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Dear Jenni

**Issues Paper**  
**Legal Representation and Jurisdictional Limit in Small Claims**

1. I refer to the Issues Paper of June 2013.

**Summary**

2. We prefer Option 3 (allowing lawyers or representatives to be involved and increasing the small claims jurisdiction to an amount over \$10,000); retaining the Courts discretion to order some costs, with enhancements discussed at paragraph 5, below.
3. In paragraphs 6 and 7 below, we suggest models and ideas that would assist in resolving consumer and business disputes.

**Issues Paper - Option 3**

4. We think Option 3 (allowing lawyers or representatives to be involved and increasing the small claims jurisdiction to an amount over \$10,000) is the better of the options proposed.
  - 4.1 We do not believe reducing choice by excluding lawyers will assist the objective of helping the community resolve small claims.
    - 4.1.1 Lawyers can provide valuable assistance in understanding legal issues, pointing people in the right direction in matters of procedure; and, if claims need to go to hearing, ensuring that evidence is presented to the court correctly.

- 4.1.2 Particularly in relation to claims for debts (for example, unpaid invoices or accounts, work done and/or goods supplied with the cost having been agreed beforehand, money lent and not repaid, wages owing, IOUs and dishonoured cheques), parties pursuing these should be permitted to engage a representative.
- 4.1.3 There are businesses and individuals who don't have the time or expertise to deal with matters in Court (whether the Small Claims Court or any other Court). There is no reason to curtail consumer or business choice outsourcing their work to someone more experienced.
- 4.1.4 In the Work Health jurisdiction, lawyers are excluded from compulsory mediation. Anecdotally, there is a move by workers and insurers for professional / legal assistance to assist the parties articulate the issues and negotiate an outcome (also to even the negotiating strength between an experienced insurer and inexperienced claimant).

## **Enhancements**

- 5. Some enhancements to consider:
  - 5.1 As mentioned above, a party's ability to recover some legal costs and out of pocket expenses, even in the Small Claims Court, should be retained.
    - 5.1.1 Perhaps consideration could be given to introducing a requirement (via the Rules) for parties to submit a cost management plan.
    - 5.1.2 For example, on 1 April 2013, a reform to the Civil Procedure rules in respect of costs management was introduced in the United Kingdom (please see [www.justice.gov.uk/courts/procedure-rules/civil](http://www.justice.gov.uk/courts/procedure-rules/civil)).
  - 5.2 The management of small claims matters could be streamlined.
    - 5.2.1 For example, in the NSW Local Court, Practice Direction Civ 1, Annexure D "Small Claims Division Case Management Order" provides that oral evidence is not permitted unless the court makes an order to that effect. The proceedings are determined on the basis of the written witness statements and other documentary material that is filed.
    - 5.2.2 Debts, if disputed, should be able to be dealt with summarily, on the papers, similarly to NSW (see page 8 of the Issues Paper, under the heading "New South Wales' Local Court Act 2007).

5.3 Other jurisdictions have lower cost initiatives such as the provision of information via the internet for self-represented parties.

5.3.1 For example, the NSW Local Court has 'LawAssist' which can be accessed from their website. The website provides:

- (a) an explanation of legal procedures and forms for court and tribunal cases.
- (b) step by step guides to starting and running your case, including instructions for filling out court forms, checklists and frequently asked questions, information on alternatives to court and contacts for further information and advice.

### **Consumer disputes**

6. We could increase public awareness of alternative ways in which disputes can be resolved, for example some disputes can be resolved through Northern Territory Consumer Affairs ([www.consumeraffairs.nt.gov.au](http://www.consumeraffairs.nt.gov.au)).

6.1 A consumer can seek the assistance of Consumer Affairs in resolving a complaint.

6.2 Consumer Affairs will provide advice and if required attempt to conciliate a dispute to obtain a fair outcome in relation to the provisions of the *Consumer Affairs and Fair Trading Act*.

### **Business disputes**

7. A 'Small Business Commission' could be set up in the Northern Territory, with one of its roles being to handle disputes involving small businesses in the first instance.

7.1 This would work best if the Local Court mandated the use of such a service before filing.

7.2 In the small claims perspective, mandating the use of a mediation service via a Small Business Commission would be positive and would stop filing before genuine settlement discussions.

8. Examples are the models adopted by Victoria, South Australia, NSW and Western Australia.

8.1 The Office of the Victorian Small Business Commissioner ('VSBC') was established in 2003.

- (a) The VSBC's functions are defined in the *Small Business Commissioner Act 2003* (Vic) and include, among other things, to receive and investigate complaints by small businesses regarding unfair market practices and mediate between the parties involved in the complaint.

- (b) The VSBC has responsibilities for dispute resolution under the *Small Business Commissioner Act 2003*, the *Retail Leases Act 2003*, the *Owner Drivers and Forestry Contractors Act 2005* and the *Farm Debt Mediation Act 2011*.
  - (c) In the first instance, Dispute Management Officers deal with the dispute at no cost to either party. If the dispute remains, the parties are invited to attend a mediation session with an independent, neutral mediator.
  - (d) Dispute resolution through mediation costs each party \$195 per day for *Retail Leases Act* and *Small Business Commissioner Act* disputes and \$95 per day for *Owner Driver and Forestry Contractors Act* disputes, with the VSBC subsidising the majority of the costs. For *Farm Debt Mediation Act* matters, each party must pay \$195 for each mediation session.
- 8.2 The South Australia Small Business Commissioner has a dispute resolution function.
- (a) It receives and investigates complaints by or on behalf of small businesses regarding their commercial dealings with other businesses, State or Local government agencies or bodies. It will assist with:
    - businesses that are treated unfairly in their commercial dealings with other businesses in the marketplace.
    - resolving retail tenancy disputes between businesses and landlords.
    - resolving other disputes eg franchising, farming disputes and the like.
    - resolving disputes between small businesses and State and/or Local Government bodies.
  - (b) If the dispute is solved at an early stage there is no cost for the service. If external mediation is required then the parties pay \$195 per party per day.
- 8.3 The Small Business Commissioner NSW is the first stop for small businesses if they have a commercial dispute.
- Their role is to help the parties find a solution, ideally through the use of negotiation, information and/or mediation.
  - It is a requirement that parties follow the Small Business Commission NSW steps before going to court.
  - If a dispute cannot be resolved through early discussions the parties will come together in formal, face-to-face mediation. The costs are based on an hourly rate payment by each party (\$152 incl GST per hour per party).

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- 80% of matters are resolved before court proceedings need to take place.

8.4 The Western Australian Small Business Development Corporation has an alternative dispute resolution role.

- (a) The types of disputes that it can be involved in include retail tenancy disputes, other commercial tenancy disputes, debt collection, business to government disputes, disputes over contracts for the supply of goods and services, franchise disputes, intellectual property disputes, trade practices, unfair market practices and professional and product liability.
- (b) Parties can apply to have their matter mediated. The cost is \$125 per party.

9. Thank you for the opportunity to provide information to you; and I look forward to your reply.

Yours sincerely

  
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Partner

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