

Small Business Development Corporation

**Second Submission to the Productivity Commission
Inquiry into Access to Justice Arrangements**

May 2014

About the Small Business Development Corporation

The Small Business Development Corporation ("SBDC") welcomes the opportunity to provide a second submission to the Productivity Commission ("Commission") Inquiry into Access to Justice Arrangements ("the Inquiry"), in response to the release of the Draft Report.

The SBDC is an independent statutory authority of the Western Australian ("WA") Government and was established in 1984 to facilitate the development and growth of small businesses in this State. Along with providing advisory and advocacy services to the small business sector in WA, the SBDC offers an alternative dispute resolution ("ADR") service to help small businesses resolve their commercial disputes. The Small Business Commissioner is the Chief Executive Officer of the SBDC. More information on the SBDC's services and functions can be found in the SBDC's first submission.¹

Summary of the SBDC's First Submission

The SBDC's first submission explored how small businesses access justice and the barriers that they commonly encounter when trying to resolve disputes. Specifically, the first submission explored:

- 1) Characteristics of small business operators that make them vulnerable to legal problems and impede their access to justice;
- 2) Experiences of WA small businesses operators who have been involved in disputes; and
- 3) Suggestions to minimise the incidence of legal problems and disputes within the small business sector, as well as improving access to justice for those who need it.

The Focus of the SBDC's Second Submission

The SBDC's second submission to this Inquiry will focus on Draft Recommendations 8.2, 8.3 and 8.4 from Chapter 8 (Alternative Dispute Resolution) and Draft Recommendation 12.2 from Chapter 12 (Duties on Parties) of the Draft Report.

¹ The Small Business Development Corporation 2013, *Submission to the Productivity Commission Inquiry into Access to Justice Arrangements October 2013*, Available from <http://www.pc.gov.au/projects/inquiry/access-justice/submissions> [15 May 2014].

General Comments

Unmet Legal Need

The Draft Report makes reference to the Small Business Dispute Resolution Survey² when trying to determine the extent of unmet legal need amongst small businesses. It also makes reference to the difficulty of measuring unmet legal need, as by its definition it refers to problems that were resolved with inappropriate advice or ones that were not resolved at all.

In the SBDC's opinion, there is a substantial level of unmet legal need amongst small businesses, particularly as anecdotal evidence suggests many small business operators are seeking advice from inappropriate sources when trying to navigate legal problems. Consequently, the SBDC believes that the Productivity Commission should place emphasis on the unmet legal needs of small businesses when making recommendations to improve access to justice arrangements. This is particularly pertinent given the importance that small businesses play in the economy as both an employer and income generator.³

According to the Draft Report, the *Law Survey*⁴ reported that consumer related issues were the most common legal problem experienced by survey participants. The SBDC would like the Productivity Commission to recognize the difficulties that some small businesses have when seeking redress as a consumer through the Australian Consumer Law ("ACL"). As stated in our first submission, the SBDC has long advocated for small businesses to be treated the same as individual consumers under the ACL.⁵

It is the SBDC's contention that consumer related issues cause significant problems for small businesses. The SBDC has anecdotal evidence of small businesses sometimes being referred away from consumer protection agencies due to the fact that they purchased their product in a business capacity. This is being done regardless of the fact that the purchase meets the criteria of a consumer purchase⁶ under the ACL (e.g. section 3 of Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*).

² The Small Business Dispute Resolution Survey undertaken by the Department of Innovation, Industry, Science and Research in 2010 and referenced on Page 96 of the Productivity Commission's Access to Justice Arrangements Draft Report 2014. Available from http://www.pc.gov.au/data/assets/pdf_file/0008/135296/access-justice-draft.pdf

³ Ibid 1.

⁴ The Legal Australia-Wide (LAW) Survey conducted by the Law and Justice Foundation of New South Wales in 2008, as referenced on page 91 of the Productivity Commission's Access to Justice Arrangements Draft Report 2014. Available from http://www.pc.gov.au/data/assets/pdf_file/0008/135296/access-justice-draft.pdf

⁵ Ibid 1.

⁶ A good or service costing up to \$40,000; or a good or service costing more than \$40,000 which would normally be for personal, domestic or household use, or goods which consist of a vehicle or trailer used to transport goods on public roads.

The lack of assistance for small businesses with a consumer law issue is a problem that is related to the discussions contained in Chapter 20 (The legal assistance landscape) of the Draft Report. Whilst the SBDC does not advocate for the provision of free legal assistance to small businesses by government agencies, we would recommend that consumer protection agencies consider amending their eligibility guidelines to include small businesses as purchasers of consumer goods.

The Draft Report states that providing people with basic information so that they can resolve their disputes privately could significantly reduce the level of unmet need. The SBDC agrees with this statement, particularly in the context of consumer law mentioned above.

Chapter 8: Alternative Dispute Resolution

The SBDC supports the recommendation that State and Territory Governments partially subsidise Small Business Commissioners to provide ADR services to small businesses, particularly where their tribunals have limited civil jurisdiction. The SBDC suggests that the approach adopted in WA be used as a basis to model future services on.

The SBDC's ADR service is low-cost, non-litigious and is tailored to meet the specific needs of small business operators to resolve their business-to-business and business-to-government disputes. As showcased in the Draft Report,⁷ this service would be classified as "facilitative ADR".⁸ The SBDC's ADR service is underpinned by a unique legislative model that differs from the models used by other jurisdictions. More information on the SBDC's model can be found in our first submission to the Inquiry.⁹

A unique aspect of the SBDC model is the linkage between the Advisory/ADR units and the Policy & Advocacy unit within the Corporation. Small business issues and disputes are captured by the Advisory and ADR units, with details being collated into the SBDC's client record management ("CRM") system. This information is used to identify patterns of disputes and recurring issues that impact on multiple businesses, which is fed back to the Policy & Advocacy unit. This then informs the SBDC's advocacy activities, either directly with government agencies at all levels or through submissions to Inquiries, such as this one.

This unique information sharing aspect of the SBDC model negates any concerns that our ADR service is masking systemic problems in the small business sector, a problem highlighted in the Draft Report. The SBDC acknowledges that this may be a problem for other ADR services which provide a fragmented and individualized

⁷Productivity Commission 2014, *Access to Justice Arrangements Draft Report*, Available from <http://www.pc.gov.au/projects/inquiry/access-justice/draft> [19 May 2014] Page 266

⁸ Ibid 7, page 251

⁹ Ibid 1

service, where there is little capacity or opportunity to identify patterns or repeat offenders and advocate back to government policy-makers.

The Draft Report highlights the fact that some State and Territory Governments are not willing to impose an obligation on parties to attempt ADR before litigating, unlike in the Federal jurisdiction where parties have a legislative obligation to do so under the *Civil Dispute Resolution Act 2011 (Cth)*.

Another interesting aspect of the SBDC's model is the referral mechanism created by section 25C of the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* between the Small Business Commissioner and the State Administrative Tribunal of WA ("SAT WA"). Under this section, a small business tenant or landlord with a retail tenancy related dispute cannot (in most instances) commence proceedings in the SAT WA without first attempting ADR through the SBDC and receiving a certificate from the Small Business Commissioner. This legislative mechanism creates an obligation on parties to attempt ADR before pursuing formal litigation. Whilst the obligation is limited to retail tenancy disputes in WA, it does go some way towards limiting the number of disputes pursued through the court and tribunal system.

The use of ADR clauses in contracts

The Draft Report recognizes that it is not uncommon for companies to agree to include ADR mechanisms within contracts as their primary enforcement mechanism. Whilst the SBDC sees many benefits of this practice, we do not believe that it is the panacea to all problems associated with small business disputes. The SBDC has anecdotally heard of examples where the ADR clause in a contract is so highly stacked in the favour of the party offering the contract that it creates a detriment for the other party. For example, the cost of accessing the ADR service is prohibitively high, or the response timeframes are too drawn-out, which acts as a deterrent to people taking it up.

In this regard, the SBDC welcomes the Federal Government's commitment to extend unfair contract term protections from consumers to small businesses.

Comments on Draft Recommendations

DRAFT RECOMMENDATION 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

The SBDC strongly supports draft recommendation 8.2 and notes that Government departments/agencies were ranked as number 4 on the list of top disputants in the 2008 LAW survey.¹⁰

The Draft Report also notes the anecdotal evidence from submissions that local governments have a propensity to use litigation rather than ADR to resolve disputes.

As mentioned earlier, the SBDC's ADR service has a business-to-government component, where Policy & Advocacy Officers work with small businesses and government agencies at all levels to resolve disputes. In the SBDC's experience, government officers are generally willing to co-operate to resolve the dispute and are open to the advocacy process. There are some occasions however where government prescribed rules and policies act as a barrier to reaching resolution, regardless of the individuals' willingness to participate in the process. In this way, a dispute resolution management plan may assist to overcome any procedural barriers to the ADR process.

The SBDC does not have current information on the prevalence of dispute management plans amongst government agencies (including local governments). However, the SBDC is considering undertaking a research mapping project to identify which local and state government agencies have a customer service charter and if it references ADR mechanisms if a dispute arises. Flowing on from this, the SBDC may consult with these departments and if viable liaise with them regarding how they could potentially incorporate the SBDC's business-to-government dispute resolution service as part of their customer service commitment.

DRAFT RECOMMENDATION 8.3

Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.

The SBDC strongly supports Draft Recommendation 8.3. The SBDC publishes information and education material regarding its own ADR service, the process and its associated benefits. This is available to small business clients in both hard copy and electronic format. These materials can be accessed on the SBDC website at <http://www.smallbusiness.wa.gov.au/alternative-dispute-resolution/> and are attached to this submission (**Attachment A**).

DRAFT RECOMMENDATION 8.4

Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including

¹⁰ Ibid 7, page 94

providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

The SBDC agrees that disputes need to be assessed to determine their priority, however cautions against the use of restrictive and formal guidelines to direct the process. The major strengths of the SBDC's ADR service are its speed and flexibility, which affords case managers the ability to adapt quickly and responsively to clients' needs. In this regard it is important that flexibility is favoured over rigidity in designing guidelines for ADR processes.

The SBDC's ADR service was introduced as an alternative to more formal court and tribunal proceedings in WA rather than as a duplicate service. It is a voluntary process and does not preclude participants from seeking concurrent assistance from other sources (e.g. pursuing claims through the courts). Another important aspect of the SBDC's ADR service is the continuity of service received by our clients. SBDC staff strive to personally assist the client without referring them to other officers within the Corporation, or outside the Corporation, unless absolutely necessary.

When a small business contacts the SBDC, the initial step undertaken by an SBDC adviser is to assess the enquiry and provide information and preliminary advice. If the adviser determines that the small business has a legitimate dispute, it will be referred to an ADR case manager who will work with both parties to attempt to facilitate an outcome acceptable to all. However, parties are at all times entitled to seek access to more formal resolution processes where ADR is not suitable or has been unsuccessful, and are encouraged to do so by case managers when this is the more appropriate course of action.

Chapter 12: Duties on Parties

DRAFT RECOMMENDATION 12.2

Commonwealth, State and Territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

The SBDC supports the imposition and enforcement of model litigant guidelines on State Government agencies and believes that the obligation should also be extended to local governments (as per the Information Request 12.3 of the Draft Report). The SBDC acknowledges that doing so will create an administrative burden for local governments that may not have the resources to firstly develop the guidelines and then to adhere to them.

However, this impact could be minimised through the provision of guidance materials and advice to local governments. Providing local governments with this assistance (including template documents and policies) will minimise the amount of time and effort required to develop appropriate guidelines.

Any template model litigant guidelines imposed on local governments must include provisions about timely communication and disclosure to the other party.

Conclusion

The SBDC is supportive of the Productivity Commission to include small businesses in its final consideration of vulnerable groups with unmet legal need. As discussed in our previous submission, small businesses play a crucial role in the WA community and contribute in significant and varied ways to the economy. As such, it is important that they can readily access justice when disputes and problems arise in the course of their business.



Small Business Development Corporation Alternative Dispute Resolution Service



The Small Business Development Corporation (SBDC) Alternative Dispute Resolution service provides a low-cost, non-litigious means of resolving business-to-business and business-to government disputes in Western Australia.

Business disputes can be harmful to a small business and time spent on lengthy court cases can be disruptive and costly.

Through a simple process of advice, guidance and mediation where appropriate, the Alternative Dispute Resolution service provides hands on, timely assistance to help small business owners resolve disputes quickly and inexpensively.

The service will be particularly effective in dealing with retail tenancy matters as the SBDC is now the first port of call for businesses experiencing disputes of this kind.

Some retail tenancy disputes will still be directed to the State Administrative Tribunal for a hearing however, a certificate from the SBDC is required for this to take place.

The Small Business and Retail Shop Legislation Amendment Act 2011, which became operational on 26 March 2012, establishes a Small Business Commissioner in Western Australia to enhance a competitive and fair operating environment for small businesses and to provide alternative dispute resolution services for small business disputes.

The Commissioner will assist small business operators to resolve complaints and disputes related to retail tenancies, the unfair market practices of other businesses and the commercial activities of government bodies.

Alternative Dispute Resolution

Achieving workable solutions

The primary role of the Alternative Dispute Resolution service is to resolve business disputes without going to court.

At the SBDC, we understand small business and have developed a service that best meets the need of small business operators.

The Alternative Dispute Resolution service is an easy process to access and to navigate. We want to help you get back to business quicker, with business relationships still intact, and without costly legal fees.

The service occurs in two stages, Guided Resolution and Mediation.

Guided Resolution

Guided Resolution commences with information, advice and guidance provided by the SBDC to assist clients in understanding their rights and obligations, clarifying the disputed issues and identifying options.

Accessing guided resolution is as easy as contacting the SBDC in person, by telephone or by email. An experienced case manager will be appointed to consider the case, contact the parties and through these discussions, seek to resolve the dispute.

Case managers will not provide legal advice or legal representation in any dispute.

The guided resolution stage is free of charge and all enquiries will be responded to quickly.

If agreement is not reached through guided resolution, or if guided resolution is not appropriate for the dispute, parties can proceed to mediation. Mediation is only available when both parties agree to participate.

For more details of the guided resolution process, please refer to the SBDC website.

Mediation

Mediation offers a more structured negotiation process in which an independent mediator assists both parties to reach an agreement.

The Small Business Commissioner will appoint an experienced mediator to facilitate the mediation, and a fee of \$125 per party applies for each mediation session. This subsidised fee covers the cost of one mediation session with the balance of the cost of mediation met by the Government of Western Australia. For most disputes, it is anticipated that a mutually agreed outcome will be achieved within one mediation session.

Mediations are arranged according to availability of resources, with urgent matters scheduled as soon as practicable.

For more details of the mediation process, please refer to the SBDC website.



What types of disputes can be assisted through Alternative Dispute Resolution?

- Retail tenancy and other commercial tenancy disputes
- Debt collection disputes
- Disputes concerning contracts for supply of goods or services
- Trade practices – restrictive trade practices, anti-competitive behaviour
- Unfair market practices
- Franchise disputes
- Business to government disputes

What if I have a retail tenancy dispute?

Under the Commercial Tenancy (Retail Shops) Agreements Act 1985 any business involved in a retail shop lease dispute can request assistance from the Small Business Commissioner to resolve the dispute.

In most cases, parties will succeed in settling disputes through the Alternative Dispute Resolution service. In the event the dispute is not settled and it is necessary to proceed to the State Administrative Tribunal for a binding decision, a certificate from the Small Business Commissioner is required.

Matters requiring injunctive relief, approvals or administrative matters will continue to proceed directly to the State Administrative Tribunal without requiring a certificate from the Commissioner.

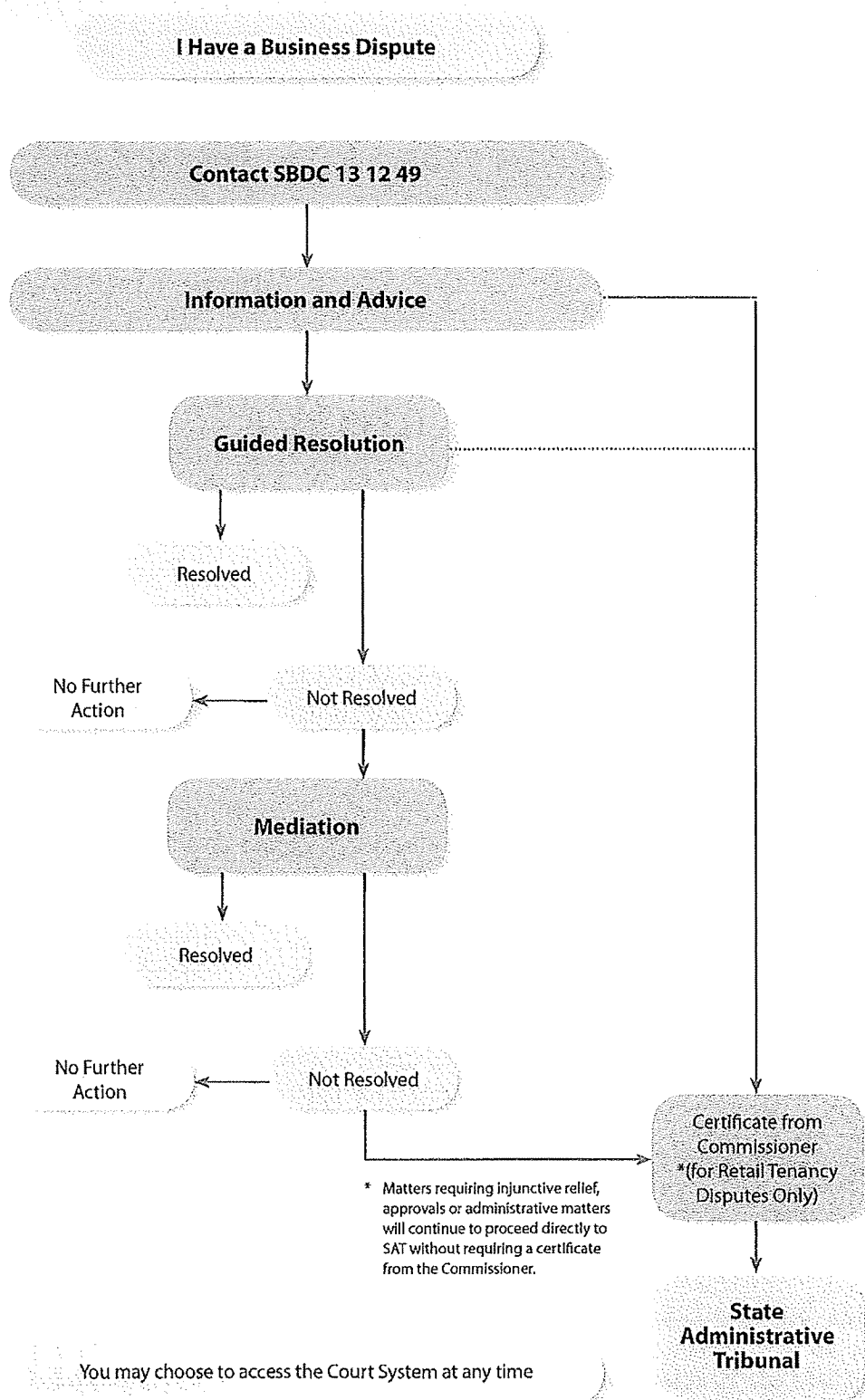
The Alternative Dispute Resolution service is provided through guided resolution and mediation. It assists small business operators to resolve business to business and business to government

disputes as well as those related retail tenancies and unfair market practices affecting small business.

The Small Business Commissioner also provides information, education,

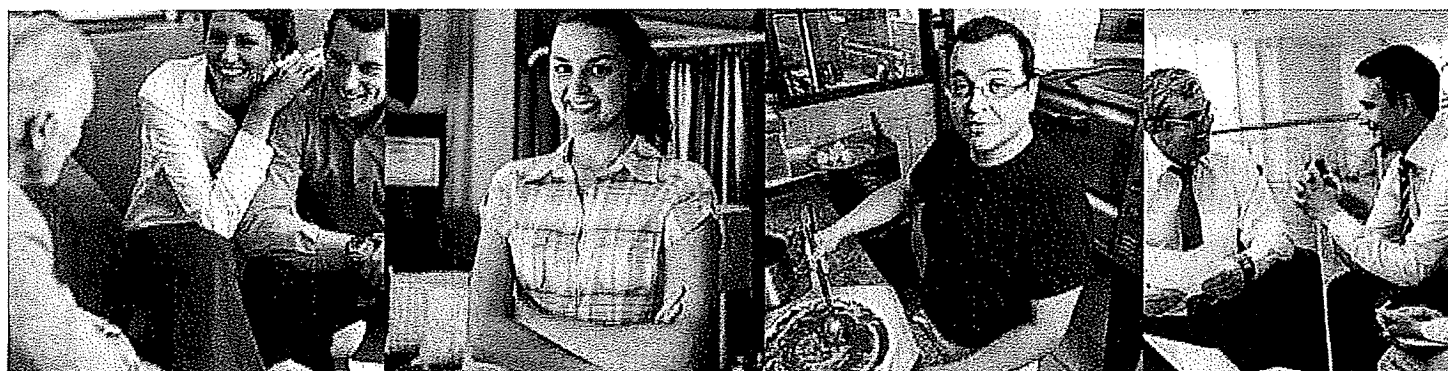
guidance and assistance to enhance a competitive and fair operating environment for small business operators and to minimise disputes.

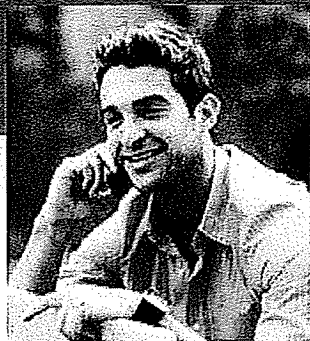
How the Alternative Dispute Resolution service works.



Other government dispute resolution services:

Type of dispute	Organisation	Website
Retail tenancy disputes Matters requiring injunctive relief, approvals or administrative matters	State Administrative Tribunal	www.sat.justice.wa.gov.au
Employment disputes To resolve disputes between employers and employees, and their representatives	WA Industrial Relations Commission	www.wairc.wa.gov.au
Consumer disputes To conciliate complaints between traders and consumers	Department of Commerce – Consumer Protection	www.commerce.wa.gov.au/consumerprotection
Franchising disputes To assist franchisors and franchisees resolve complaints	Office of the Franchising Mediation Advisor	www.franchisingmediationadviser.com.au
Debt or damages disputes Minor claims up to \$10,000; general claims up to \$75,000	Magistrates Court of WA – pre-trial conference	www.magistratescourt.wa.gov.au
Debt or damages disputes Civil claims up to \$750,000	District Court of WA	www.districtcourt.wa.gov.au
Debt or damages disputes Civil claims for debt or damages greater than \$750,000	Supreme Court of WA – court ordered mediation	www.supremecourt.wa.gov.au





For more information

**Contact the Small Business Development Corporation
or your nearest Small Business Centre.**

Gordon Stephenson House
140 William Street, Perth WA 6000
(2nd floor, access off Murray Street Mall)
Telephone: 13 12 49
Email: info@smallbusiness.wa.gov.au
Website: www.smallbusiness.wa.gov.au/adr
Facebook: www.facebook.com/smallbusinesswa

Information is available in alternative formats for people with disabilities and interpreter services can be made available, subject to prior notice. Assistance is also available to complete any part of the Alternative Dispute Resolution process.

Other services provided by the Small Business Development Corporation

- Small business advisory service
- Business Information Centre
- Business licensing information
- Business skills workshops
- Business bookshop
- Small Business Centre Network

Disclaimer: This brochure provides general information about the processes involved in accessing the Small Business Development Corporation, the Small Business Commissioner and the Alternative Dispute Resolution service. You should not act or omit to act on the basis of anything contained herein. In relation to a particular matter, you should seek appropriate legal/professional advice. This brochure should be read in conjunction with Information which can be found on our website at www.smallbusiness.wa.gov.au/adr.