



OUT17/16359

Mr Alan Cameron AO
Chair
NSW Law Reform Commission
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Dear Mr Cameron,

Consultation Paper 18 - Dispute Resolution Model Provisions

Thank you for opportunity for the Office of the NSW Small Business Commissioner (OSBC) to provide feedback on the proposed Dispute Resolution Model Provisions (Model) and additional time in which to provide this submission.

The OSBC is focused on supporting and improving the operating environment for small businesses throughout NSW. The role of OSBC is to provide mediation and dispute resolution services, speak up for small businesses within government and make it easier and simpler to do business through policy harmonisation and regulatory reform.

We offer the following comments on how the Model may impact small business in NSW and the provision of our services.

Model Provision 1:

Definition of accredited mediator

The proposed definition of accredited mediator limits the ability for other accreditation schemes which may also seek to improve the provision of dispute resolution services. While the National Mediation Accreditation Scheme (NMAS) is recognised across Australia, other schemes may now or in the future exist that hold the same or higher standard.

A primary concern the OSBC has with the NMAS program comes from our frequent interaction with organisations looking to create an industry specific dispute resolution scheme. In every instance, those with little or no experience with mediation expect that a mediator with NMAS accreditation will have the experience, skills, and judgement to effectively facilitate mediation across a broad range of issues for a broad range of parties. In these instances I'm reminded of Inigo Montoya in *The Princess Bride* who says, "I do not think it means what you think it means." The users of these industry schemes may be small businesses the OSBC represents.

Additionally, the OSBC is approached by many newly accredited mediators who also have a false view of what NMAS accreditation means to them. Many believe that after spending \$4,000 or more for training and assessment there is a pathway for them to develop a financially rewarding mediation practice. Very few have these expectations realised. These are small businesses the OSBC represents.

Definition of Mediation

The OSBC agrees with a number of other submissions to this consultation paper that suggest the proposed definition of Mediation should not either include or exclude conciliation and/or neutral evaluation. The OSBC suggest that the definition of mediation should be set out in the suite of services available. Having a set definition compromises the ability for the service to adapt to meet the ever changing needs of the market.

Flexibility is inherent in the process of mediation. It may assist the LRC to have greater insight into the breadth of services offered by the OSBC now and in the near future, under the existing definitions in the *Retail Leases Act 1994 (RLA)* and the *Small Business Commissioner's Act 2013 (SBCA)*, the *Motor Dealer Smash Repairers Act 2013*, the Motor Vehicle Insurance and Repair Industry Code of Conduct 2017 and other instruments of Parliament.

One element of the proposed definition for mediation speaks of parties coming together, which is not technically the case in informal, shuttle or online mediation processes. The outcomes of these processes should not suffer from limitations proposed by the Discussion Paper, because the proposed definition does not provide the flexibility for parties to resolve their disputes at the earliest possible point for the least amount of money with the assistance of a trained neutral facilitator.

For example, the OSBC is developing an online mediation platform to allow parties to resolve their dispute with a guided decision making process; with or without the direct involvement of a mediator. Their mediation experience must retain the protection of confidentiality and the agreement should be enforceable if they so choose. To proceed with the proposed standard definition would create an inequitable outcome for small businesses in NSW.

The OSBC assists parties to resolve 97 percent of the issues brought to mediation. This is achieved by the provision of strategic and procedural advice and informal or shuttle mediation. The confidentiality of this assistance and these interactions is protected by the definition of mediation under the RLA and SBCA. Agreements are enforceable if structured in a manner acceptable to a court. It would be a poor outcome for the 20,000+ NSW small business operators who benefit from the OSBC's services if a legislative instrument defines mediation in a limited manner.

Model Provision 2: Confidentiality and admissibility of mediation communications in evidence

The proposed definition of Mediation Communications would limit the use a party can make of their statutory declarations or expert reports commissioned and when used at mediation. The preparation for mediation comes at a cost and parties should not need to incur further costs of obtaining the leave of a court to introduce their information as evidence. To proceed with this definition would create an inequitable outcome for small businesses in NSW.

The confidentiality provisions under the RLA and SBCA relate only to a statement or admission made during the course of mediation or a dispute resolution process. As part of mediation, parties are advised that their information (documents, photos, reports) remains their information to be used as they like, while control of the other parties' information is retained by them.

Model Provision 3: Mediator's immunity

The OSBC Dispute Resolution Unit staff are trained in excess of the requirements for NMAS accreditation. They undertake emotional intelligence assessments and general capability assessments prior to employment, they receive significant and ongoing coaching, supervision, training and mentoring during the course of their employment. NMAS accreditation is not a requirement to be an OSBC Mediation Officer.

It is the observation of the OSBC, very few mediators with recently obtained accreditation have the level of skill required to conduct face-to-face mediation for OSBC parties.

The standard to be on the OSBC panel – a group of highly skilled and experienced professional mediators - is much higher than that of NMAS accreditation. All the mediators on the OSBC panel meet the training standards of NMAS accreditation, although not all are accredited. All OSBC mediators are observed, supervised, and debriefed. Parties are surveyed to ensure the services received meet the high standard of the OSBC.

It would be inappropriate for the high quality services provided by the OSBC and the immunity protection of mediators to be effected by a requirement to meet a specific accreditation standard that does not add value to the work of the OSBC.

Model Provision 4: Termination of mediation

The OSBC recommends that the question of the termination of mediation is best left to the parties and mediator involved in the mediation or to the legislation or mediation agreement under which the parties proceed to mediation.

Model Provision 5: Enforcement of mediated settlement agreements

The OSBC recommends the enforceability of a mediated settlement agreement should remain a matter for the courts, tribunals and parties to mediation. The question of NMAS accreditation should have no impact on the enforceability of agreements made by parties; whether at mediation or otherwise.

Mediation can be a stressful process and while a mediator explains many things during the process, some parties do not retain all that has been explained to them potentially creating an additional dispute for parties and the mediator. In the OSBC's view, a mediator cannot be put into the position of providing legal advice about the enforceability of a mediated settlement agreement and exposed to the subsequent risks that flows from such.

Suspension of limitation periods

Under the RLA and SBCA parties can file their claim with a court or tribunal and the dispute can proceed to mediation. This provides the parties, courts and tribunals with the appropriate level of flexibility to make the process work for each particular matter. In the view of the OSBC, to have a legislative instrument dealing with the suspension of limitation periods which impacts a variety of needs and processes would create perverse outcomes.

Consistent Model/Approach

When NMAS accreditation and other accreditation schemes deliver outcomes that meet the expectation of users of mediation services and those seeking accreditation the OSBC will support the accreditation of mediators.

For accreditation to ensure these expectations are met further work is needed, such as:

- More consistency in the quality of mediation training programs
- Clarity about the personal skills required and pre-training assessment of a prospective trainee's potential to develop expertise as a mediator
- Separation of the delivery of training and the subsequent assessment and accreditation of mediators
- Development of pathways for newly trained mediators to gain proficiency – much more is needed than volunteer coaching of other newly trained mediators who are doing roleplaying in mediation simulations. A role play is a good introduction to mediation but is not a substitute for observation, mentoring and experience.

Far better than allowing parties to contract out of the proposed mediation legislation, would be to promote the proposals for voluntary use, such as *Key Practices for Industry-based Customer Dispute Resolution*, created by the Australian Government.

Application of Model Provisions

In the OSBC's view, to mandate these model provisions for selected mediation in NSW creates problems for the users of some mediation services. That 44 Acts and regulations identified are recommended for exemption supports this view.

The OSBC does not support the application to the 10 statutes listed in Appendix A, yet if this is to proceed, the RLA and SBCA **must** be moved to Appendix B. In support of this claim to be exempted, it is noted that the OSBC provides supervised mediation, using employees and third party dispute resolution practitioners.

With only eight Acts remaining on Appendix A for amendment, it seems the creation of yet another legislative instrument does not meet the NSW test of better regulation.

The influence of the NSWLRC provides a strong framework for the transformation of mediation training, accreditation and dispute resolution services across NSW and the OSBC would welcome the opportunity to work with the NSWLRC to make the improvements necessary to keep pace with the transforming industry.

A joint industry approach would allow the NSWLRC to redesign model mediation provisions not just with NMAS accreditation in mind, but to ensure all accreditation processes meets the needs of existing and prospective stakeholders, as well as those of mediation training providers.

Should you have any queries, please contact Candace Barron via email on [REDACTED] or by phone on [REDACTED].

Yours sincerely

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Robyn Hobbs OAM
NSW Small Business Commissioner

3 May 2017