

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

2016 - 2017

Division/Agency: Australian Small Business and Family Enterprise Ombudsman

Question No: 155

Topic: Access to Justice

Reference: Written

Senator: Ketter, Chris

Question:

1. In your opinion, does small business remain at a disadvantage in regards to access to justice?
2. Does this apply to issues such as private litigation in matters such as misuse of market power?
3. Has the office of the Small Business Ombudsman made representations to the Government and/or Treasury about access to justice for small business litigants? When did this occur? What was the Government or Treasury response?
4. Do you believe the proposal to allow judges to issue a 'no adverse cost order' in litigation related to the misuse of market power has merit?
5. Has the office of the Small Business Ombudsman made representations to the Government or Treasury in favour of such a proposal, or similar remedies to facilitate access to justice?
6. The current effects test legislation – which you been clear in your support for – does not have provisions related to access to justice. Will this undermine the ability of small business to able to use the misuse of market power's so-called effects test?
7. Is the risk of large legal bills as a result of an adverse cost order still a strong possibility under the Government's misuse of power amendments?

Answer:

1. Yes.
2. Yes.
3. Yes. This issue is represented in our advocacy (for example, see publicly released inquiry reports) and assistance functions (these are 1:1 assistance provided to small business including in respect of the actions of government). It is also in our work program for further focused action this year.
4. Once litigation has commenced, although 'no adverse cost orders' may have merit it is dependent on the overall design. In particular, we advocate for the use of alternative dispute resolution as a speedy and low cost way of dealing with issues without the need to resort to litigation. Successful alternative dispute resolution programs mean that business disruption and cost due to litigation are avoided entirely. We also note that small business issues requiring alternative dispute resolution extend significantly beyond issues of market power.
5. We have already commenced work in this area and, as noted, will shortly be commencing a wider program of work.
6. No, since the legislation sets a broader framework through which lawful and compliant business is conducted. Unlawful practices can be addressed through various avenues that cover a range of approaches such as direct approach, alternative dispute resolution and

litigation. This change makes it easier for small business to address inappropriate conduct in any of these ways (including litigation).

7. In any court case, an adverse costs order is a possibility. I have indicated that we are shortly commencing work on a broad-ranging approach to small business access to justice issues that includes issues of market power as well as the much wider range of issues that some small businesses may need to address. Our aim is to keep small businesses out of court entirely and therefore avoid the possibility of such orders.