



Law Council
OF AUSTRALIA

Business Law Section

The Manager
Small Business Ombudsman and Procurement Unit
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600
Via email: small.business@treasury.gov.au

27 May 2014

Dear Manager,

Discussion Paper: The Small Business and Family Enterprise Ombudsman

I have pleasure in enclosing a submission in response to the Discussion Paper entitled "The Small Business and Family Enterprise Ombudsman".

The submission has been prepared by the SME Business Law Committee of the Business Law Section of the Law Council of Australia.

Thank you for giving us the opportunity to comment.

Yours faithfully,

Teresa Dyson
Acting Chair, Business Law Section

Enc.

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Submission on Discussion Paper concerning The Small Business and Family Enterprise Ombudsman

**Submission by the SME Business Law
Committee of the Business Law Section of
the Law Council of Australia to the Treasury**

Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The SME Business Law Committee of the Business Law Section of the Law Council of Australia (“the Committee”) makes this submission in response to the Discussion Paper dated April 2014 released by the Hon Bruce Billson MP, Minister for Small Business and entitled “The Small Business and Family Enterprise Ombudsman” (“the Discussion Paper”).

The Committee has as its primary focus the consideration of legal issues affecting small businesses and medium enterprises and the development of national legal policy in that domain. Its membership is comprised of legal practitioners, who are extensively involved in legal issues affecting such businesses.

On 30 June 2011, the Committee provided a submission to the Department of Innovation, Industry, Science and Research concerning an Options Paper entitled “Resolution of Small Business Disputes”. That earlier submission canvasses a number of similar issues raised in the Discussion Paper and is attached for ease of reference. The Committee stands by its 2011 submission.

Executive Summary

The Committee welcomes the Discussion Paper and congratulates the Minister for Small Business on its development.

For some time the Committee has been advocating small business dispute resolution as an issue warranting consideration by the Federal Government.

The Committee acknowledges that this Commonwealth role is to complement existing State Commissioners, and notes that in some States there is no Commissioner and the Commonwealth role may require modification until there are Commissioners in all States and Territories.

The Committee sees no justification for the establishment of a separate, small business specific tribunal with deliberative powers.

However, there is a role for the Federal Government to assist in the resolution of certain small business disputes. The Federal Government should assume primary responsibility for dispute resolution service delivery where there is no State or Territory service or where there are cross- jurisdictional issues or specific Federal issues.

The Committee welcomes the opportunity to consult with the Minister and the Treasury on the next steps.

Focus questions — summary

Concierge for Dispute Resolution

Q: What should the scope of the Ombudsman’s own mediation service include? For example, small business disputes with Australian Government agencies or disputes under industry codes of conduct?

A: The Committee notes the existence of existing small business dispute resolution services provided by various State governments and within various industry sectors. By and large, those existing dispute resolution services operate well.

Accordingly, the Committee takes the view that duplication should be avoided, with the consequence that the primary roles for the Ombudsman should be:

- as a central body responsibility for liaison with existing small business dispute resolution services;
- establishment of a central portal to direct those with small business disputes to the most appropriate dispute resolution service;
- the provision of a primary small business dispute resolution service for small businesses dealing with Australian Government Agencies;
- research and benchmarking of the various small business dispute resolution services; and
- development of resources to support best practice in small business dispute resolution nationally.

Q: What powers should be conferred to the Ombudsman to resolve small business disputes?

A: The Committee does not support the Ombudsman exercising an administrative function in determining disputes and regards such a role as inimical to the concept of mediation.

The Ombudsman should have such powers as are required to effectively perform its key roles, as identified above. These should include:

- the power to collect and collate such data as is reasonably required from the many existing small business dispute resolution services;
- the power to conduct research as to best practice in small business dispute resolution;
- the power in its area of exclusive influence (i.e. disputes between small businesses and Australian Government agencies) to require mediation in response to a request for mediation by a small business;
- the power to establish and maintain a panel of suitably accredited mediators.

Q: Which types of dispute resolution services should the Ombudsman provide and what should be the model for providing these services? For example, should these services be outsourced or provided in-house?

A: The Ombudsman should have some degree of flexibility in the range of dispute resolution services to be provided. Experience in various State small business dispute resolution services reveals that both in-house and externally provided mediation services can be effective.

The Committee believes the Ombudsman would be best able to perform a broad range of dispute resolution services by having available:

- appropriately trained staff with basic dispute resolution expertise to provide a first point of contact triage service; and
- mediators drawn from a panel of accredited and experienced mediators.

In the latter case, the Committee takes the view that the cost of mediation should be borne by the parties but notes that, to the extent that mediation obviates the necessity for litigation, there are considerable savings to the Australian Government in the various State Governments. So some degree of subsidy may be warranted, as has been recognized as appropriate in some State run small business dispute resolution services.

Commonwealth-wide advocate

Q: How can the Ombudsman be a strong advocate to the Government? Are there particular practices that the Ombudsman should focus on?

A: The Ombudsman will become, in effect, a peak body and clearing house for small business disputes throughout Australia.

By virtue of its likely role as a primary portal or first point of contact for small business disputes, the Ombudsman will be able to compile data and conduct research as to trends in small business disputes, the efficacy of small business dispute resolution services and the development of best practice in small business dispute resolution services.

As a consequence, the Ombudsman will have the capacity to be a strong advocate to Government and a credible rapporteur regarding emerging areas of dysfunction that may warrant Government attention.

Likewise, the unique role of the Ombudsman will make possible the development and promulgation of best practice resources for small business dispute resolution, education of small business on strategies to avoid disputes in the first place and research as to the cost benefit of small business dispute resolution services.

Q: How can the Ombudsman be a strong advocate to larger businesses on the needs of small businesses?

A: See comments above.

Q: Should the Ombudsman be conferred powers to investigate allegations of practices in the public and private sectors that are negatively affecting small businesses?

A: As noted, in due course the Ombudsman will likely become a primary first point of contact for those seeking assistance with small business disputes and thus have a capacity to monitor trends and areas of dysfunction in the SME sector at large. That central clearing house role makes it possible the capture and analysis of sector specific data and so the Ombudsman should be charged with the conduct of regular audits as to the impact of regulatory burden and opportunities for the burden of regulation to be reduced or regulation to be simplified.

Contributor to Commonwealth laws and regulations

Q: How should the Ombudsman engage with small businesses and family enterprises to identify the regulatory burdens most affecting them?

A: See comments above.

Q: What activities should the Ombudsman be tasked with in order to make Commonwealth laws and regulations more small business and family enterprise friendly?

A: The Committee takes the view that it is the responsibility of the Minister for Small Business to be the primary advocate for the SME sector within Government and to ensure that in the drafting of Commonwealth laws and regulations the particular concerns of small business and family enterprises are considered.

The Committee believes that in the discharge of that obligation the Minister for Small Business would be assisted by regular consultation with the Ombudsman regarding proposed Commonwealth laws and regulations that might impact on small business and family enterprises. However, it should not be the primary role of an Ombudsman to be concerned with legislative drafting. Rather, the Ombudsman should be in a position and appropriately resourced to identify and report regularly on:

- Commonwealth laws and regulations that impact adversely on small businesses and family enterprises;
- complex and confusing Commonwealth laws and regulations that impact on small businesses and family enterprises;
- areas of dysfunction in dealings as between small businesses and Australian Government Agencies; and
- legislative barriers to the establishment of small businesses and family enterprises.

A single entry-point agency

Q: What delivery channels should be used to provide the single entry-point? For example, a website, hotline or social media.

A: In a rapidly changing technological era all channels for engagement with small businesses and family enterprises should be embraced. Without limiting those channels, they should at least include:

- a highly evolved website with easy links to other existing small business dispute resolution services;
- an active presence on social media, including Facebook, Twitter and Linked-in;
- development of industry specific Apps;
- a rich online resource of materials to assist small businesses and family enterprises identify likely areas of dispute in their commercial dealings, strategies to avoid those disputes and techniques to assist in dispute resolution.

Q: What key information should the single entry-point provide?

A: See comments above.

Q: In relation to the Ombudsman website, what is the best way to link with existing authoritative sources of information for small business? For example, would links to existing websites be sufficient?

A: The website should be interactive and provide multiple channels for accessing relevant links. It might include an embedded decision-tree diagnostic tool so as to effectively direct website users to the small business dispute resolution service that is most appropriate.

Q: In addition to providing information and initial support to small businesses, what other forms of small business engagement could the single entry-point offer?

A: See comments above.

Method of appointment

Q: How should the Ombudsman be appointed?

A: Consistent with standard practice, the position of the Ombudsman should be nationally advertised. An interview panel should include an appropriately experienced representative of the SME sector and also a person with deep experience in the mediation of small business

and family enterprise disputes.

Q: What is the appropriate length of appointment of the Ombudsman, and should there be an option for re-appointment?

A: The Committee believes that the Ombudsman should be appointed for a 5-year term with no automatic entitlement to a further term.

A reasonable length of tenure is essential to enable the Ombudsman to be a frank and forthright rapporteur and an effective advocate to Government on behalf of the small business and family enterprise sector.

Q: How should dismissal of the Ombudsman be managed?

A: The Committee is of the view that an Ombudsman should only be capable of dismissal following a vote of the Commonwealth parliament.

Conclusion

The Committee welcomes the opportunity to comment on the Discussion Paper and looks forward to the opportunity for further consultation. Any questions about this submission should be directed to the Committee Chair, Ms Coralie Kenny, on 02-8275 3175 or via email: coralie_kenny@asteronlife.com.au