



Submission to Senate Inquiry
Australian Small Business and Family Enterprise Ombudsman Bill
16 July 2015

1. Overview

Independent Contractors Australia is a strong supporter of, and advocate for, the concept of Small Business Commissioners (SBCs), in this instance with the Commonwealth-badged Small Business and Family Enterprise Ombudsman (SBFEO).

- Our primary interest is in the dispute resolution/mediation powers.
- In general we support the Bill as it currently stands, with recommendations for strengthening the mediation powers.

List of recommendations are

- Alternative dispute resolution required before legal proceedings taken. (see 4c)
- Guarantees be included to ensure mediation services are *low cost* (see 4d)
- Compulsory attendance at mediation. (see 4e)
- Ombudsman may certify the outcome of dispute resolution assistance. (see 4g)
- Commonwealth agencies must use alternative dispute resolution. (see 4h)

2. Background: Why the SBFEO is needed—inexpensive dispute mediation

In contractual undertakings between small business people and large businesses or government entities there is an imbalance of power. This occurs for a simple reason—namely, that in a dispute the small businessperson generally cannot afford the legal expense of asserting his or her commercial contractual rights. That is, no matter what the rights or wrongs of a situation may be, the larger party can win because it can afford to apply legal muscle where the small businessperson cannot.

This is bad not only for small business people but also for the economy as a whole, because it diminishes trust in commercial activity, thereby reducing the volume and quantity of commercial transactions.

The table below shows that 62 per cent of Australian workers work in small businesses. For a nation to maximize its economic potential it's essential that people

working in small businesses have, as near as possible, an effective contractual power balance with large organisations.

The idea of a Small Business Commissioner was first developed in Victoria more than a decade ago. Over the last few years SBCs have been created in NSW, WA and SA. The most important function the SBCs perform is the provision of inexpensive dispute mediation services for small business people. The mediation services are designed to create a trigger for mutually agreed, commercial dispute resolution before parties resort to the courts.

The services are successful. Victoria reported over 1,700 applications for assistance in 2013–14 with settlement rates over 80 per cent. The other State SBCs report similar outcomes.

The conceptual role of the Commonwealth SBFE0 is to fill gaps where the State SBCs have limitations in providing assistance. This is in areas where:

- A dispute is with a Commonwealth entity.
- A large national business claims that a State SBC does not have jurisdiction.

Where people work

	%	Workers	Small to20	Med 20-49
Employees	45.2		3.3 m	1.9 m
Self-employed employers	8.7		1.0 m	
Self-employed ICs	8.5		0.9 m	
Private small-med	62	7.1 m	5.2 m	1.9 m
Private med-big 50+	23	2.6 m		
Public	15	1.8 m		
Total		11.5 m		

(based on 2010 figures)

In May 2014, ICA made a submission to the Treasury Discussion Paper on the Australian Small Business and Family Enterprise Ombudsman. The submission is available here: [<http://www.independentcontractors.net.au/Downloads/Fixing-Disputes/ICA-submission-Small-Business-Ombudsman-2014.pdf>]

We support the SBFE0 because it adds a necessary part to a mix of practical support services to enhance the contribution that small business makes to Australia. We see the SBFE0 as complementing, rather than competing with, the State SBCs. We believe that small business mediation services should be conducted at the local level, with the States as the priority. Our reading of the Bill is that this objective is achieved.

3. Comparing the state SBC Acts with the SBFE0 Bill

The State SBC Acts are relatively similar, with some variations between them. All Acts enable the SBCs to conduct low-cost mediation. The main variations are where some states but not others:

- require mediation before parties can take a matter to court;
- can require attendance at mediation and the provision of information;
- empower SBCs to issue a report on mediation outcomes to a court prior to court proceedings.

As a general rule, proceedings in mediation are not admissible in any court action.

ICA supports the stronger powers listed above. We believe that these powers give the mediation process a level of importance that enhances the chances of successful outcomes. Importantly, there is no limitation on any party's rights to take action in the courts.

The SBFEO Bill

- Prevents the SBFEO from conducting mediation.
- Confers only a power to recommend mediation.
- Does not guarantee low-cost mediation. In fact one outcome could be that mediation is comparatively expensive.
- Allows the SBFEO to publicise if a party has refused to take part in mediation

ICA would prefer to see these powers strengthened.

4. The key features of SBFEO mediation under the Bill. ICA comment and recommendations

4 (a) *Referral to other agencies*

The SBFEO can respond to requests for assistance by referring the request to another agency or recommending mediation. Anyone can request assistance.

ICA supports this.

The Bill states:

15 The assistance function 18

The following functions are included in the *assistance function*:

- (a) to respond under Division 2 of Part 4 to requests for assistance in relation to relevant actions, including by referring requests to another agency of the Commonwealth, a State or a Territory or by working co-operatively with another agency of the Commonwealth, a State or a Territory to give assistance;
- (b) where a request for assistance relates to a dispute in relation to a relevant action, to make recommendations under Division 3 of Part 4 about how the dispute may be managed, including recommendations that an alternative dispute resolution process be used to manage the dispute.

66 Requests for assistance 2

- (1) Any person may request assistance from the Ombudsman in relation to a relevant action.

4 (b) *No service overlap*

The SBFEO does not provide services where another State or Commonwealth agency currently provides services and/or is better placed to provide the services. That is, the SBFEO fills service 'gaps'. Further, the SBFEO can work with other agencies to provide services.

ICA supports this.

The Bill states:

69 Circumstances in which the Ombudsman must transfer a request for assistance to another agency

- (1) The Ombudsman must not give assistance in response to a request for assistance in relation

- to a relevant action, or give further assistance in response to such a request, if:
- (a) the Ombudsman reasonably believes that:
 - (i) the request could have been made to another agency of the Commonwealth, a State or a Territory; and
 - (ii) the request could be more conveniently or effectively dealt with by the other agency; and
 - (b) the other agency has the legal power to deal with the request.

70 Circumstances in which the Ombudsman may work co-operatively with another agency to give assistance

- (1) The Ombudsman may enter into an arrangement with another agency of the Commonwealth, a State or a Territory, to work co-operatively with the other agency:
 - (a) to deal with a request for assistance in relation to a relevant action; and
 - (b) to deal with a class of requests for assistance in relation to relevant actions.

4 (c) *Recommend mediation*

The SBFEO may recommend that parties to a dispute attend mediation.
ICA supports this but recommends strengthening the provision.

The Bill states

71 Ombudsman may recommend alternative dispute resolution process

- (1) If a person requests the Ombudsman to give assistance in a dispute in relation to a relevant action, the Ombudsman may make recommendations on how the dispute may be managed.
- (2) Without limiting subsection (1):
 - (a) the Ombudsman may recommend that the parties to the dispute should take part in an alternative dispute resolution process, or alternative dispute resolution processes, of the kind specified in the recommendation; and
 - (b) the Ombudsman may recommend that the alternative dispute resolution process or processes be conducted by one or more of a group of persons specified in the recommendation who are drawn from the list of alternative dispute resolution providers published by the Ombudsman under section 72.

ICA comment and recommendation

ICA supports this. However, it recommends strengthening the powers so that if the Ombudsman recommends mediation, the parties cannot proceed to a court action until such time as mediation has been completed. We recommend a clause along the following lines:

Alternative dispute resolution required before legal proceedings can be taken

If an application is made to the Ombudsman for assistance in resolving a complaint or other dispute involving a small business and the Ombudsman decides to recommend alternative dispute resolution, the matter to which the complaint relates or the dispute may not be the subject of any proceedings before any court unless and until the Ombudsman has certified in writing that alternative dispute-resolution services provided under this Act have failed to resolve the matter or dispute.

4 (d) *Cannot conduct mediation*

The SBFEO is prevented from conducting alternative dispute resolution services itself.

The Bill states:

73 Alternative dispute resolution processes not to be conducted by the Ombudsman

- (1) An alternative dispute resolution process recommended by the Ombudsman is to be conducted by a person, other than a person mentioned in subsection (2), chosen by the parties to the dispute.
- (2) An alternative dispute resolution process recommended by the Ombudsman must not be conducted by:
 - (a) the Ombudsman; or

- (b) a delegate of the Ombudsman; or
- (c) a person assisting the Ombudsman under section;

This is significantly different from the State SBCs, but ICA is not particularly concerned about this. The important issue is that mediation is available.

However, ICA has concerns as to the cost. In the States, the mediation services are cheap (around \$200 for a small businessperson) because the SBCs conduct the mediations, usually using outsourced specialists. The concern with the SBFEO Bill is that there is no assurance that any mediation services that could be on offer would be low cost. Mediation services can often be quite expensive, substantially defeating their purpose from the small businessperson's perspective.

ICA would want to see some guarantees around ensuring low-cost mediation where mediation is recommended.

4 (e) *Failure to take part in mediation*

The SBFEO may publicise the fact that a party has refused to take part in mediation. However, ICA recommends that the SBFEO have the power to make attendance at mediation compulsory.

The Bill states

74 Publishing failure to participate in alternative dispute resolution process

- (1) The Ombudsman may publicise, in any way that the Ombudsman thinks appropriate, either or both of the following:
 - (a) that an entity who is a party to a dispute in relation to a relevant action has refused to engage in an alternative dispute resolution process, or alternative dispute resolution processes, of the kind recommended by the Ombudsman under paragraph 71(2)(a);

ICA recommends a provision along the following lines:

Compulsory attendance at mediation

(1) For the purposes of mediating a complaint or other dispute involving a small business, the Ombudsman may, by notice in writing, require any person to attend a meeting at a time and place specified in the notice.

Penalty: 30 penalty units.

4 (f) *Compulsion to provide information*

The SBFEO can require a party to present information.

The Bill states:

76 Notice to person to provide information and documents

- (1) If the Ombudsman reasonably believes that a person has, or could take reasonable steps to obtain, information or documents relevant to an inquiry under this Division, the Ombudsman may, by notice, require the person to send to the Ombudsman:
 - (a) a statement setting out the specified information; and
 - (b) specified documents.
- (4) A person who is served a notice under this section must comply with the notice.

Penalty: 30 penalty units.

ICA strongly supports this.

4 (g) *Role of the SBFEO after mediation*

Under the Bill the Ombudsman has no function after mediation has occurred. ICA recommends that the Ombudsman has a final power—namely, where appropriate, to make a report to a court on the outcome of mediation.

ICA recommends a provision along the following lines:

The Ombudsman may certify the outcome of dispute resolution assistance

- (1) The Ombudsman may certify in writing the outcome of any application made to the Ombudsman for assistance in resolving a complaint or other dispute involving a small business.
- (2) Any such certificate is admissible as evidence in any civil proceedings of the outcome of the application.
- (3) Any statement or admission made in connection with any alternative dispute resolution services provided through the Ombudsman under this Act is not admissible in any legal proceedings.
- (4) A reference in this section to the outcome of an application for assistance in resolving a complaint or other dispute involving a small business is a reference to whether or not the application was resolved and to whether any agreement was reached by the parties.

4 (h) *Commonwealth agencies must conduct mediation*

ICA believes that the Commonwealth should take a lead and be a model dispute resolver in relation to its disputes with small businesspeople. This can best be expressed by the Commonwealth Parliament taking a decision to require its agencies to participate in mediation before proceeding to any court process.

ICA recommends a provision in the Bill along the following lines:

Commonwealth agencies must undertake alternative dispute resolution

Where a Commonwealth agency is in dispute with a small business and the dispute is not resolved, the agency must refer the matter to the Ombudsman under this Act and follow the recommendations of the Ombudsman, including taking part in alternative dispute resolution where and how so recommended.