



**The Small Business and Family Enterprise Ombudsman
Discussion Paper
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Submission made by

Business Enterprise Centres Australia Incorporated

Contact: Executive Officer – Mike Hawkins

Submission Author – Peter Murray

Correspondence: Innovation House, Park Way, Mawson Lakes SA

Introduction

BEC Australia is the peak body representing Business Enterprise Centres (BECs) throughout Australia. BECs are not-for-profit, community based, providers of small business advisory services and other assistance to their local small business communities. Our members are the first point of call for many of the more than 50% of small businesses who do not belong to any industry or business association when seeking business assistance and information. BECs interact with numerous government agencies including the Commonwealth and various State Small Business Commissioners and act as an effective conduit between them and small business. Our members are the trusted advisors of numerous small businesses. As such we are pleased to have the opportunity to lodge this submission in relation to the Small Business and Family Enterprise Ombudsman Discussion Paper.

The various state and the current Commonwealth Small Business Commissioners have been effective in helping businesses pursue disputes through mediation and other alternative dispute resolution processes, rather than going straight to the courts. This is a good outcome for everyone involved. Without this service, many small business disputes would probably have gone through expensive litigation processes and not necessarily come out with a resolution. BEC Australia expects that the proposed Ombudsman would build on these successes. Our response to the questions raised in the discussion paper have been outlined below under the relevant headings from the discussion paper.

Concierge for dispute resolution

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?

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

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?

With 84% of disputes or issues raised with the Australian Small Business Commissioner being resolved through conducting preliminary enquiries, the existing dispute resolution powers of the Commissioner are obviously working well and thus should be transferred to the Ombudsman. The online tool currently being developed to complement these activities should be completed.

The Ombudsman's own mediation service should focus on:

- Disputes with Australian Government agencies

- Mediate international business disputes concerning small business.
- Mediate interstate business disputes.

The Ombudsman should provide a dispute resolution mechanism for small businesses in disputes regarding their commercial relationships with Australian Government agencies.

It is difficult for small businesses and many family businesses to travel overseas to try and resolve a dispute with a supplier. Many small businesses do not fully understand the risks associated with doing business internationally and do not undertake sufficient research and due diligence before entering into international agreements. Many do not understand their obligations. This can lead to disputes. The Ombudsman's office has a role to assist with International dispute resolution. There is also a role to educate small businesses in this regard.

National uniformity in relation to small businesses engaged in interstate business disputes is desirable — to avoid different outcomes in different jurisdictions on similar issues. Large corporations often have a presence in several jurisdictions, and so a dispute between a corporation and a small business in one jurisdiction could be relevant to small businesses in other jurisdictions. Such disputes are better handled at the national level, while disputes between small businesses and national corporations that affect entities in only one jurisdiction should be dealt with at a state level. This service should include offering access to pre-mediation and alternative dispute resolution processes.

The Ombudsman needs to be supported by legislated powers. Small businesses can be destroyed by disputes, and the intervention by an Ombudsman may be one method to prevent this. The Ombudsman should be conferred powers to:

- make administrative decisions;
- investigate small business disputes, including obtaining information from parties; and
- compel parties to attend mediation before approaching a tribunal or court.

The Ombudsman should make administrative decisions that do not preclude an action being brought to the Federal Court if a party fails to comply with the decision. The Federal Court would then exercise its judicial power, without reference to the actions of the Ombudsman, in adjudicating on the matter.

The Ombudsman should use a mandatory referral system, where certain types of disputes require a certificate from the Ombudsman before the dispute can be dealt with by a tribunal or a court. In addition the Ombudsman should have the power to impose financial costs for non-attendance at scheduled mediation, with non-attending parties being liable to pay the full cost (rather than the subsidised cost) of mediation.

Commonwealth-wide advocate

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

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

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

BEC Australia supports the Ombudsman's advocacy role. Small business needs someone advocating on their behalf. If the Ombudsman were to report directly to Parliament rather than to the Minister for Small Business, it may have more legitimacy in the eyes of small businesses. This would also avoid any perceptions that the role is subservient to political processes, particularly if the Ombudsman is involved in reviewing or investigating issues that are of direct interest to the Minister's responsibilities. However this legitimacy can also be achieved via making the Ombudsman a statutory appointment and through the provision of sufficient legislated powers.

The Ombudsman as an independent advocate can act as a conduit for national issues impacting on small businesses and represent small businesses in advocating action to address these identified issues. Further, the Ombudsman should work with federal, state and territory government departments and agencies, the state small business commissioners, COSBOA, BECA, industry associations and other small business bodies including BECs to ensure that matters affecting small businesses across all the States and Territories are represented and given a national voice. Legislated powers to obtain information and investigate complaints will assist the Ombudsman to perform this role.

Activities undertaken in this advocacy role should include:

- Monitoring, investigating and advising the Minister about market practices that may adversely affect small business, particularly practices of large business;
- Reporting to the Minister on matters affecting small business. This could be at the request of the Minister or on the Ombudsman's own initiative;
- Taking actions aimed at facilitating and encouraging the fair treatment of small businesses in their dealings with larger businesses, and federal, state and local government bodies;
- Identifying and reporting on the impact of government administrative and compliance requirements and their cumulative impact;
- Advising government of the effectiveness of dispute and justice mechanisms available to small business – particularly if large business attempt to make these ineffective through increasing the cost or time – ie stretching the small businesses

resources to breaking point, a tactic often employed by big business in their dealings with small business.

Unfortunately most small business owners do not have sufficient time to keep up-to-date with or contribute to the development of Government policies. Nevertheless, the Ombudsman can fulfil a role in assisting government agencies to interact with small business and evaluate the impact of their policies and practices on small businesses. This can be done via interactions with Industry Associations and other small business associations/bodies, and through conducting small business focus groups through BECs and other bodies.

Where the proposed ombudsman receives a complaint that should be investigated by another agency – eg by the Commonwealth Ombudsman – rather than referring the complainant on, the proposed Ombudsman's office should take the details of the complaint and forward these onto the relevant agency to deal with. If this is not done the often time-poor complainant can feel that they are getting the run around.

The issue of unequal bargaining power when small business deals with larger businesses is one of major concern to and impact on small business. Any actions that the Ombudsman could take to address this imbalance would be welcome by small business and their representatives.

In relation to the provision of information, there is already a plethora of information available on the internet and in other media. The Small Business Support Line and business.gov.au are two very good examples. Rather than recreating this information, it would be better for the Ombudsman to extract the information already available and provide it in a small business focussed manner. However, information provided via these media needs to be relatively generic and does not take into account individual circumstances. Small businesses often access BEC advisors after obtaining this generic information from the internet and other sources and ask them to interpret it in relation to their specific business situation – ie they want tailored business advice – how does this apply to me in my particular circumstances. This type of information can only be provided one-on-one. For example they may have researched different business structures on the internet, but be unsure whether in their particular circumstances they should operate under a partnership or company structure; or they may be uncertain if a certain regulation/permit/licence relates to their business. They are loathe to ask government for this assistance in case they find out there is something else they need to do or some other compliance requirements they need to meet. Small businesses need to be able to access the generic information, but they also need to be able to access advisors who can assist them work through the detail as to what it means for their specific business in its specific circumstances.

The Ombudsman should be conferred powers to investigate allegations of practices in the public and private sectors that are negatively affecting small businesses. The Ombudsman needs to be provided with the power to investigate allegations of unfair treatment and practices of small business by larger organisations. The Ombudsman should be able to require any person, business, organisation or government agency to provide information relating to their dealings with small businesses which would aid the Ombudsman in conducting any investigation.

Contributor to Commonwealth laws and regulations

How should the Ombudsman engage with small businesses and family enterprises to identify the regulatory burdens most affecting them?
What activities should the Ombudsman be tasked with in order to make Commonwealth laws and regulations more small business and family enterprise friendly?

As mentioned previously, most small business owners do not have sufficient time to keep up-to-date with or contribute to the development of Government policies or to advise how laws and regulations could be made more small business and family enterprise friendly. Nevertheless, the Ombudsman can fulfil a role in assisting government agencies to interact with small business, to identify and evaluate which regulatory burdens are having the biggest impact, and how Government laws and regulations can be made more small business and family enterprise friendly. This can be done via interactions with COSBOA, Family Business Australia, BECA, other Industry Associations, other small business associations/bodies, and through conducting small business focus groups through BECs and other similar groups. My BEC has arranged a number of different focus groups on a range of issues for a range of government departments and agencies at all levels of government. Some of these have been specific interest or business type – others a cross section of small business owners.

The Ombudsman should have the power to investigate and report to the Minister on the impact of legislation and government policy of the Commonwealth or any State or Territory on small business. For the reasons outlined in the discussion paper, it is vital that government legislation and regulation are small business friendly. The Ombudsman should be given powers to direct a person, by written notice, to do the following:

- provide any information required;
- attend and give evidence before an authorised official;
- produce any documents in the custody or under the control of the person;
- answer questions as required;
- require answers to questions be verified or given on oath or affirmation; or

- impose a penalty for non-compliance with a lawful direction.

The Ombudsman's reports, once tabled, should be treated as reports of parliamentary committees.

There are numerous government boards and committees. The Ombudsman could be appointed to some of these government boards and committees, thereby providing an opportunity for the Ombudsman to review and guide the development and implementation of legislation, policies and practices. However, he is unlikely to be able to sit on all such bodies. Where the Ombudsman is not directly appointed, he/she could be consulted on appointments and recommend people with appropriate small business backgrounds to be appointed. The Ombudsman should also play a role in facilitating linkages among small businesses organisations and government agencies and regulators at the Commonwealth and state and territory levels.

It could be difficult for the Ombudsman to engage directly with small businesses as they are time and resource-poor and do not tend to engage directly with government. They also tend to focus on immediate, day to day, concerns about running their business, rather than broader, longer term legislative and regulatory red tape burdens. It would be valuable for the Ombudsman to work directly with intermediaries such as BEC Australia and its members, Family Business Australia, and other industry bodies that are better positioned to gather and articulate the needs and concerns of small businesses and family businesses.

A single-entry point agency

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

What key information should the single entry-point provide?

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?

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

In providing a dedicated, small business oriented single entry-point the Ombudsman will need to be careful not to duplicate services already provided. There is already a plethora of information available on the internet and in other media. The Small Business Support Line and business.gov.au are two very good examples. Rather than recreating these, it would be better for the Ombudsman to extract the information already available and provide it in a small business focussed manner. However, information provided via these media needs to be relatively generic and does not take into account individual circumstances. Small

businesses often access BEC advisors after obtaining this generic information from the internet and other sources and ask them to interpret it in relation to their specific business situation – ie they want tailored business advice – how does this apply to me in my particular circumstances. This type of information can only be provided one-on-one. Small Business owners are loathe to ask government for this assistance in case they find out there is something else they need to do or some other compliance requirements they need to meet. Small businesses need to be able to access the generic information, but they also need to be able to access advisors who can assist them work through the detail as to what it means for their specific business in its specific circumstances, and how to implement this into their business practices.

The comments above are supported by the Productivity Commission's report *Regulator Engagement with Small Business*, which highlighted that small businesses often complain that governments, particularly regulators, provide too much information, that the information is often difficult to understand, and that different government organisations or people can provide conflicting advice. Ultimately small businesses want an answer or advice that is clear, practical and consistent. This is what the BEC advisors provide.

A range of delivery channels should be used by the Ombudsman in order to provide a single-entry point agency. This includes a website, hotline, and social media as well as via face-to-face presentations at conferences, the National Small Business Summit and other business functions. Small business also needs to be able to access independent small business advice and information customised to their specific circumstances and needs. Such services also need to be funded.

The Small Business Support Line should move into the Ombudsman's office. This service should continue to direct small businesses to the agencies and organisations best able to assist. BEC Australia is proud of the number of callers referred to its members by the Support Line and of the assistance provided by our members to these small businesses. As well as BECs receiving referrals from the Support Line and other government agencies, BECs also refer small businesses to relevant government agencies and disseminate information from government to small business. Our members therefore also form part of the delivery channel – as do other small business organisations and Industry Associations. As significantly less than 50% of small businesses belong to any Industry or Business Association, the role of BECs in disseminating government information to small businesses – particularly micro and home-based businesses – should not be underestimated. No other organisation has anywhere near the reach and connection to these businesses as our network has.

The single-entry point needs to provide a referral service to the organisations and agencies best able to assist the small businesses accessing it. These referrals need to occur through all the delivery channels.

Method of appointment

How should the Ombudsman be appointed?

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

How should dismissal of the Ombudsman be managed?

Not only must the Ombudsman be independent, he/she must be seen to be independent from Government. Hence the Ombudsman should be a statutory appointment. The disadvantage with this method is that it will take longer to implement. To some extent this disadvantage can be reduced by maintaining the current Commonwealth Small Business Commissioner until the office of Ombudsman is established.

Based on other similar roles it would appear that an appropriate term would be 5 years with an option to be re-appointed for one more term.

The suggestion in the discussion paper that to ensure the independence of the Ombudsman dismissal could only take place after a review by the Commonwealth Ombudsman seems reasonable.

For the most part, support staff should be engaged as employees of the statutory authority headed by the Ombudsman. However, it may be worthwhile to also appoint one or two Deputy Ombudsmen as support to the ombudsman, to assume the ombudsman's role in case of illness/incapacity, or with specific duties/responsibilities - in much the same way as the ACCC has a small business Commissioner, there may be a Deputy Ombudsman with specific responsibility for engaging with relevant industry associations and other small business bodies. If any Deputy Ombudsmen are appointed, these should also be statutory appointments.

As the Ombudsman's office needs to liaise extensively with State Governments and, in particular, the various State Small Business Commissioners it is likely that an office will need to be maintained in each State.