



SUBMISSION BY THE
Housing Industry Association

to
Treasury
on the
**Small Business and Family Enterprise Ombudsman
Discussion Paper**

8 July 2014

CONTENTS

1	Executive Summary	1
2	Specific Comments on the Options in the Paper	2
2.1	Dispute resolution	2
2.2	Ombudsman as advocate and contributor to Commonwealth laws and regulations	3
2.3	Single entry point	4
2.4	Method of appointment	4

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85 per cent of all new home building work in Australia is performed by HIA members.



1 Executive Summary

The Housing Industry Association Limited (HIA) welcomes the opportunity to comment on the Small Business and Family Enterprise Ombudsman Discussion Paper (the 'Paper').

HIA notes the Government's commitment to transform the current office of the Australian Small Business Commissioner into a Small Business and Family Enterprise Ombudsman (the Ombudsman). Funding of \$6 million has been committed in the recent federal budget.

HIA supports the Commonwealth Government's overall focus and agenda on better representing the interests of the small business community.

The housing industry is made up of over 85 per cent small business. The small family owned contracting business is the backbone of Australia's residential building industry and is internationally renowned for its productivity. This model is characterised by businesses that are responsible for their own work, set their own hours and move flexibly from site to site.

Compliance with excessive red tape and regulation is a critical issue for these small businesses. They must comply with a legislative framework that spans a multitude of Commonwealth, state and local laws and regulations including industrial relations, tax, workers compensation, workplace health and safety, licensing, planning, environment, dispute resolution, builders warranty obligations, and consumer protection contractual requirements.

The overwhelming burden of excessive red tape and regulation is often cited by HIA members as the number one reason they leave the industry.

The Government has outlined four key responsibilities for the proposed new Small Business Ombudsman:

- a concierge for dispute resolution;
- a Commonwealth-wide advocate for small business and family enterprises;
- a contributor for the development of small business friendly Commonwealth laws and regulation; and
- a single entry-point agency through which Commonwealth assistance and information regarding small business can be accessed.

HIA submit that the Ombudsman must operate with a goal to ensuring minimal disruption to business.

Its focus should be on assisting small business in their dealings with Commonwealth Government, both in the form of excessive red tape and regulation and their contractual relationships with various agencies.

HIA does not support the Ombudsman actively intervening in business-to-business disputes occurring in the construction sector.



2 Specific Comments on the Options in the Paper

2.1 Dispute resolution

HIA notes a key function of the proposed role is to offer mediation services and to refer businesses to existing dispute resolution services.

HIA agrees a key function of the Ombudsman could be to provide generalised information and advice on appropriate avenues of dispute resolution and conflict management.

With regard to mediation services, one of the practical difficulties with providing these services at a federal level, is not only avoiding duplication of existing services available at a state level but in ensuring that a mediator has sufficient knowledge of the industry or subject matter to add value.

Disputes in the construction sector in particular can be complex, arising from the terms of a lengthy standard form contract and can be influenced by a range of factors, including the availability of statutory rights under security of payment laws.

In this regard, all states and territories have construction industry specific laws that deal with not only payments within the construction industry between builders and subcontractors and suppliers but also strict security of payment and contract rules.

Mediation processes can be undermined by a security of payment claim, which typically favors the claimant.

Whilst there is a dispute resolution service gap with respect to business-to-business disputes for claims by a principal contractor/builder against a subcontractor for defective work, from HIA's experience, the nature of most construction disputes demands that the mediator understands basic technical building requirements and unfortunately this is not always the case.

Further as a general principle HIA does not support government or regulatory interference in commercial arrangements between contracting parties, including dispute resolution arrangements.

Parties should be free to contract and agree upon their own terms and conditions, including the terms and conditions of payment.

To this end, HIA does not support the Office of the Ombudsman having compulsory powers, nor the ability to impose sanctions between two commercial parties.

In the construction industry, in particular, an interventionist Ombudsman with dispute resolution powers would complicate and disturb current practices.

Ombudsman activism should be limited to contractual disputes between Commonwealth government agencies and small business.



2.2 Ombudsman as advocate and contributor to Commonwealth laws and regulations

HIA supports the advocacy of small business issues and to this extent strongly supported the inclusion of the small business ministry within Cabinet.

HIA notes that there are several types of Ombudsman including:

- Parliamentary Ombudsmen who take complaints from citizens and constituents about Commonwealth agencies government agencies;
- Statutory regulators who undertake a number of functions, including investigating and policing compliance of a certain law or set of laws such as the Fair Work Ombudsman which is the responsible regulator for workplace relations;
- Other statutory Ombudsmen/Commissioners who investigate complaints about particular agencies or professional services – such as health; and
- Industry-based Ombudsmen who take complaints from customers of companies providing particular services – such as telecommunications, banking, insurance, investments, energy, water and public transport¹.

HIA notes that the previous Government's May 2011 Small Business Disputes Options Paper stated the following:

“Two of the key principles for defining an Ombudsman are independence and impartiality. In essence, this means that a Small Business Ombudsman cannot be a champion of small business or an advocate for business issues. ANZOA has issued Guidelines on the use of the term “Ombudsman” and it is clear that the word “Ombudsman” is not appropriate for what is envisaged here.

The responsibility for complaints regarding government bodies would remain with the Commonwealth Ombudsman.”

For these reasons HIA notes that the former Government established a Small Business Commissioner.

Regardless of whether or not the office is called an Ombudsman or Commissioner, HIA supports the continuation of a resourced role to also independently inform the government on initiatives, legislation, regulations and propositions which directly affect the small business sector.

In HIA's experience, in recent years little to no regard was taken with respect to the impact either one-off or at a cumulative level of additional regulation on the small businesses community, in particular on the residential construction sector.

Examples of such additional regulation include the *Taxation Administration Amendment Regulation 2012 (No 1)* introduced by the former Federal Government in 2012 requiring all businesses in the building and construction industry to prepare and lodge an annual report detailing the names, details and payments made to all contractors they have engaged.

Additionally much of the recent COAG 'harmonisation' agenda, such as the development of model workplace health and safety laws were developed principally with the interests of regulators and large business in mind, rather than the thousands of small business who usually operated exclusively within their own state or territory jurisdiction.

¹ Australia and New Zealand Ombudsman Association, *Essential criteria for describing a body as an Ombudsman*. 2010.



In this regard, HIA considers the most significant role of the Ombudsman should be in representing small business interests and concerns with respect to the regulatory burdens of small business.

This could include undertaking the appropriate research and enquiries on 'red tape' and regulation impacting on small business.

HIA agrees the examples of how the Ombudsman could assist in identifying and reducing regulatory burden on small business set out on pages 21 and 22 of the Discussion paper are appropriate.

With regard to the proposed investigation powers, HIA notes that matters of 'fairness' are largely matters regulated under the unconscionability provisions of the *Competition and Consumer Act 2010*.

HIA does not support the Ombudsman investigating unregulated matters of subjective opinion, such as the 'fair' contract terms between two commercial contracting parties.

2.3 Single entry point

HIA supports the concept of a single entry point of information for small business.

However the practical difficulties of one agency having sufficient resources and knowledge to inform and advise small business on the diverse range of regulatory issues impacting on their business, many of which require specialised industry, technical or legal knowledge is likely to mean the Ombudsman will at best filter the small business person to existing resources provided by other Commonwealth or State Government agencies in the relevant area.

It is important that small business people not be confused on where to go.

For instance the Fair Work Ombudsman already has a dedicated small business helpline and the Australian Tax Office has similar resources.

HIA also doubts whether the type of dispute resolution or regulatory matters affecting small business in the residential construction industry are likely to be understood or easily conveyed through either a Commonwealth based website or call centre.

Accordingly and based on HIA's experience as a representative of small, medium and large business, it is typical for a business confronted with a query, issue or dispute to turn to their industry association for tailored advice as to the options available to them.

If this advice is not available, or does not satisfy their needs, then the next avenue is typically a lawyer.

2.4 Method of appointment

To ensure the Ombudsman's independence from government, HIA supports the statutory appointment of the office, with the ombudsman responsible to either the Small Business Minister or Parliament.

HIA does not support the Ombudsman having coercive dispute resolution or investigatory powers with respect to disputes or complaints that do not involve Commonwealth government agencies.