

## The Small Business and Family Enterprise Ombudsman – Discussion Paper

### Response from the Victorian Small Business Commissioner

#### 1. Avoiding duplication and confusion

I strongly support the statement in the Discussion Paper that ‘the Ombudsman’s services must, where possible, avoid duplication of existing dispute resolution services’. I would strengthen this statement by removing the qualifier ‘where possible’. Where duplicated dispute resolution services exist, businesses will be confused about which is the appropriate or preferred service, and of more concern, if dissatisfied with the outcome from one service, may subsequently approach the alternatively available service. Such forum shopping and ‘second efforts’ must be avoided. This risk is acknowledged in Chapter 2 of the Paper.

If it is not possible to avoid all potential duplication, the Ombudsman legislation should prevent the Ombudsman dealing with a business dispute if it has already been dealt with by another dispute resolution service, such as a State Small Business Commissioner.

#### 2. Scope of Ombudsman’s dispute resolution service – type of dispute

##### Commonwealth agencies

I support the Ombudsman having dispute resolution services to deal with disputes between businesses and Commonwealth agencies, providing the function does not duplicate or overlap other bodies (such as the Commonwealth Ombudsman).

##### Offshore businesses

I also support the role in disputes with international businesses without a presence in Australia. While my Office has had occasional success in resolving disputes between a Victorian business and an offshore business, this is the exception rather than the rule. A Commonwealth agency is more likely to be able to resolve disputes with offshore businesses. However, where a dispute is with an international business with presence in Australia, those disputes quite comfortably fall within the role of State Small Business Commissioners.

##### Multi-state disputes

I provide qualified support for the Ombudsman having a dispute resolution role where national uniformity is desired when a dispute involves a business with multi-State interests. Currently, my Office deals with disputes with many businesses with interests in other jurisdictions, but the disputes are localised and not relevant to interstate considerations. There is no reason why the Ombudsman should have jurisdiction over these disputes. There is also no reason why the Ombudsman should have jurisdiction over disputes in areas such as retail leases, where the location of the premises is the defining criteria, not the multi-State interests of the landlord or tenant.

There is also no reason for the Ombudsman to have jurisdiction over a dispute simply because one party is in one State and the other party is in another. My Office currently deals, successfully, with many disputes such as this. Where the two parties are both in jurisdictions with Small Business

Commissioners, there is scope through informal referral for the dispute to be handled in the jurisdiction most suitable to the parties.

To ensure the Ombudsman only has jurisdiction over relevant interstate disputes, and to avoid risks of duplication, it is proposed that the scope make express reference to the dispute involving matters where a nationally uniform approach is necessary and unlikely to be achieved through State-based dispute resolution, and that the legislation requires consultation between the Ombudsman and State Small Business Commissioners (in States relevant to a particular dispute) on the appropriate jurisdiction to deal with such a dispute. Equally, the Ombudsman should be able to receive referrals of disputes from State Small Business Commissioners where it is considered that such disputes are best dealt with at a national level. These disputes are likely to be those with some element of systemic cause, and multiple incidence, rather than one-off disputes.

#### Mandatory National Industry codes

My Office, established in 2003, has not dealt with any disputes under the Horticulture Code, Oilcode, or the Unit Pricing Code. My understanding from informal discussion with the Office of the Mediation Adviser is that such disputes are rare.

However, my Office has dealt with many franchising disputes over the past 11 years, typically receiving 30 – 40 applications per annum.

The establishment of the Office of the Franchising Mediation Adviser (OFMA) under the Franchising Code in 1998 preceded the establishment of my Office in 2003, and other State Small Business Commissioner offices in the past three years. Currently, franchising disputes in Victoria, NSW, SA or WA may be dealt with by the OFMA or the State Commissioners. In the case of Victoria, such disputes clearly fall within the scope of the *Small Business Commissioner Act 2003*.

The recent review of the Franchising Code, and the subsequent government response, has proposed the continuation of the current arrangements whereby parties can choose to resolve a franchise dispute through a mediator of their choice (which may be via a State Commissioner) or via a mediation adviser appointed by the Minister. This is an area of duplicated service that could be addressed as part of the specification of the scope and role of the Ombudsman

The evolution and 'mainstreaming' of alternative dispute resolution in business practices over the past decade has been dramatic. It is questionable whether an OFMA would be prescribed today if the Franchising Code was only now being developed, given the presence of State Small Business Commissioners providing mediation services in some jurisdictions, and private mediation practices more generally available.

The primary principle of avoiding service duplication is particularly important in considering the potential role for the Ombudsman with franchising disputes. Assuming the continuation of the need for a mediation adviser under the Franchising Code, I would suggest it is appropriate for the Ombudsman to be appointed as the mediation adviser, but it uses State Small Business Commissioners as the 'mediator' appointed to resolve the dispute in jurisdictions where such Commissioners exist. In such circumstances, franchise disputes lodged with the Ombudsman (as mediation adviser) would be referred to the relevant State Small Business Commissioner. I do not consider it necessary or appropriate for the Ombudsman to provide such mediation services itself, or

arrange them via a panel or list of mediators, where State Small Business Commissioners provide that service. In States/Territories without Small Business Commissioners, the options are for the Ombudsman as mediation adviser to provide the mediation service itself, or to refer the parties to a list of mediators in the relevant jurisdiction. I note that the OFMA currently uses the latter approach, although it occasionally does offer a 'light' dispute resolution service to try to resolve a dispute without the need to proceed to formal mediation. The most recent quarterly report from the OFMA shows only 1 matter dealt with under its 'early intervention facilitation' service in the 12 months to 31 March 2014, and 71 mediations conducted in the same period.. While the disputes arising under national codes may provide some argument supporting the Ombudsman/mediation adviser providing the mediation service itself for jurisdictions without Small Business Commissioners, the issue of the Ombudsman providing dispute resolution services in some jurisdictions but not others, discussed below, is in my view the stronger argument, suggesting the Ombudsman/mediation adviser should not directly provide such services.

In summary, I suggest that:

- The Ombudsman be appointed as the mediation adviser;
- The Ombudsman/mediation adviser provide information to franchisors/ees about the Code, dispute resolution, etc. as the current OFMA does;
- The Ombudsman/mediation adviser fulfils its obligations under the Franchising Code by referring franchise disputes to State Small Business Commissioners in those jurisdictions with Commissioners, without engaging in any prior 'preliminary assistance' or 'early intervention facilitation' to try to resolve the dispute to avoid any duplication of service;
- The Ombudsman/mediation adviser refers franchise disputes in other States/Territories to a list of mediators capable of providing such services in those States/ Territories, as currently occurs with the OFMA.

I believe this arrangement could apply without change to the proposed changes to the Franchising Code as foreshadowed in Exposure Drafts, although for absolute clarity it may be preferable for the referral of disputes by the Ombudsman/mediation adviser to a State Small Business Commissioner to be expressly acknowledged in the Code as fulfilling the Ombudsman/mediation adviser's role in this regard.

### 3. Provision of ADR services by Ombudsman in State/Territories without Small Business Commissioners

I consider it is inappropriate and undesirable for the Ombudsman to provide ADR services for business disputes in jurisdictions without State Small Business Commissioners, other than for disputes within scope as presented in 2 above.

Providing such services essentially places the Ombudsman as the defacto Small Business Commissioner in that State or Territory, when those State and Territory Governments have decided not to fund Small Business Commissioners in their jurisdictions.

Further, I understand that constitutionally it is not possible for a Commonwealth body to provide services in some jurisdictions and not others. Hence, if the Ombudsman provided ADR services (of

whatever form) in non-Commissioner jurisdictions, it would have to offer such services in jurisdictions with Commissioners, totally contrary to the principle of avoiding service duplication.

#### 4. Scope of Ombudsman's dispute resolution service – type of ADR service

The Paper notes that:

*“Alternative dispute resolution is an umbrella term that covers a range of negotiation based methods that enable parties to prevent or manage their own disputes. Alternative dispute resolution processes can involve a number of services including: the provision of information and education to small business to help parties avoid disputes; early-stage guided resolution; investigation; conciliation (making no determinations); facilitation of mediation on issues within its jurisdiction; independent neutral evaluation; and assisted negotiation.”*

The Paper also refers on a number of occasions to the Ombudsman making ‘preliminary enquiries’ into a matter before considering an appropriate method to resolve the dispute.

The Paper questions whether the Ombudsman's role should include some or all of these services.

While all of these (and other) types of services fall within a broad definition of alternative dispute resolution, the provision of information and education can be differentiated from the other services. Providing information and education does not of itself involve a proactive process of engaging with the parties to attempt to resolve a dispute, whether via informal or formal methods. It assists parties to avoid disputes, and can assist a party in a dispute about actions to take to resolve the dispute. I support the Ombudsman having a function to provide information and education to help parties avoid disputes.

I also support the Ombudsman having a broad power to determine the most appropriate form of ADR for a particular dispute for disputes within scope of the Ombudsman's role.

For disputes not within the Ombudsman's role, the Ombudsman's functions should be limited to information and education. If the Ombudsman is referring a matter to a State Small Business Commissioner, the Ombudsman should not be making preliminary enquiries of the parties to determine the most suitable means of dispute resolution, nor should it engage with the respondent party to assist in dispute resolution. That is a process the State Commissioners will undertake as part of their alternative dispute resolution service, and any duplicated effort by the Ombudsman is inefficient and confusing for the parties.

#### 5. Powers to settle disputes

The Victorian Small Business Commissioner has used ‘preliminary assistance’ and mediation as its ADR services since 2003. ‘Preliminary assistance’ involves engaging with the parties, by phone, email or mail, to try to resolve a dispute through some shuttle negotiation. It is likely to be similar to what is referred to as ‘preliminary enquiries’, ‘assisted negotiation’, and in some cases ‘conciliation’.

The neutral role of these functions, and the reliance on the parties themselves to reach a resolution albeit with facilitative assistance, have been strong characteristics of the VSBC service. While on occasions parties (or one party) have expected the VSBC to ‘make a decision’, the vast majority of

parties engaging with the Office have understood and been satisfied with the services provided, which gives them control of the outcome.

Further, the VSBC has no powers to compel a party to participate in its dispute resolution services. While there are possible implications if a party refuses to engage, it remains up to a party if it wishes to engage or not in light of those possible implications.

The question posed in the Paper is whether the Ombudsman should have any determinative powers beyond those such as used by the VSBC.

Providing scope for administrative decisions, non-binding determinations and the like by the Ombudsman needs to be considered carefully. Firstly, what does the availability of such powers do to the dynamic affecting decisions by a party to engage with the Ombudsman? Will parties to a mediation be as prepared to reach a mutually agreed outcome if they know that, if they do not, the Ombudsman can make a determination? Is it the Ombudsman or the parties who determine what form of ADR will be used – mediation, conciliation or determination? What if the two parties differ? Can a mediation turn into a determinative process half way through, and on whose decision?

Secondly, if determinative powers were provided, the appropriate form of such powers may vary according to the type of dispute. For example, for business-to-Commonwealth disputes, an administrative decision power could be appropriate, if the parties were unable to reach resolution through mediation. This is arguably less appropriate for other types of disputes within the Ombudsman's scope as proposed above: business-to-offshore business and certain multi-State business-to-business.

Generally, while supporting the Ombudsman's powers to utilise the most appropriate form of ADR, I would suggest limiting any determinative powers to administrative decisions where a dispute involves a Commonwealth agency, if the parties were unable to otherwise resolve the dispute. Some checks and balances would need to apply to such administrative decisions.

The Paper also questions the desirability of including powers to compel participation in ADR and to provide information.

The Victorian *Small Business Commissioner Act 2003* was recently amended to enable the Commissioner to issue a certificate and report in its Annual Report if a party has 'unreasonably refused' to engage in ADR. This may be an appropriate tool for the Ombudsman, particularly for disputes with Commonwealth agencies. Similarly, failure of a Commonwealth agency to provide information requested by the Ombudsman could also be reported in an Annual Report.

### Investigations

The power to compel production of certain types of information may also be desirable to enable the Ombudsman to undertake investigations. The ability to report on the outcome of investigations should also be legislated, whether to the Minister, other relevant bodies, and/or Parliament. Procedural fairness requirements would be necessary in any investigation powers, together with appropriate confidentiality requirements.

## 6. Delivery of dispute resolution services

The delivery of ADR services by the Ombudsman's Office for disputes within scope are best provided by a flexible combination of staff-delivered services and externally-delivered services. Certain types of ADR may best be provided, or provided on a better value-for-money basis, by different delivery mechanism.

If the Ombudsman proposes to use external mediators (or other ADR practitioners) for disputes within scope, I do not see any need or benefit in using State Commissioner panels of accredited mediators through memoranda of understanding or similar arrangements. The Ombudsman should identify appropriate practitioners and engage them directly, on terms and criteria determined by the Ombudsman. There is no advantage in using a State Commissioner's office to identify and appoint a mediator to an Ombudsman matter when the Ombudsman can do it directly. However, my Office would be very willing to notify my mediators of the interest of the Ombudsman in establishing its own list of ADR practitioners (if that is the case), and refer them to relevant sources of further information.

I also note that each of the four State Small Business Commissioners apply different pricing models to their mediations. It would appear sensible for the Ombudsman to have its own pricing structure and mediator arrangements for disputes within its scope, rather than somehow be caught up with differential pricing and other arrangements if using State based mediator panels.

## 7. Collaboration

The Paper makes reference to the current Australian Small Business Commissioner working collaboratively with State Small Business Commissioners. I support and confirm this collaborative arrangement, and look forward to it continuing with the Ombudsman.

## 8 Commonwealth wide advocate

I broadly support the advocacy directions included in Chapter 3 of the Paper. The Ombudsman should have a role advocating on behalf of small business into the Commonwealth Government, and to industry.

An advocacy role on policy and regulatory issues on behalf of a constituency can sit uncomfortably with an independent, neutral dispute resolution role involving one of that constituency. It is very important that the neutrality of the Ombudsman's ADR role in disputes within scope is not compromised or questioned. Importantly, just because the Ombudsman may advocate on behalf of small businesses generally does not mean that the Ombudsman (or delegated ADR practitioner) is necessarily advocating on behalf of a particular small business in a dispute. The willingness of parties to participate in resolving a dispute through the Ombudsman will depend greatly on the perceived independence and neutrality of the service. The legislation could make clear this distinction between advocacy for a broad constituency and neutrality in dispute resolution.

The advocacy role of the Ombudsman needs to be viewed against the proposal to give the Ombudsman determinative power (see 5 above). Will the other party in a dispute with a small business willingly agree to a determinative process with the Ombudsman, knowing that the Ombudsman advocates on behalf of small business?

## Investigation powers

The Ombudsman's powers to investigate allegations of inappropriate or unfair practices should be limited to matters within the scope of its dispute resolution functions. Otherwise, there will be duplication with similar powers of State Small Business Commissioners.

### 9. Contribution to Commonwealth laws and regulations

I support this as an important role of the Ombudsman. However, it is important that the functions do not overlap those of other bodies such as the Auditor General.

The recent Productivity Commission review into regulator's engagement with small business highlights the type of areas where the Ombudsman could advocate, investigate, monitor and report improvements by Commonwealth regulators against Productivity Commission recommendations.

### 10. Single Entry Point to Commonwealth programs, support and information.

I support the approach presented in Chapter 5.

### 11. Method of Appointment

I support the Ombudsman being a statutory appointment, to enforce the independence of the role, and to provide commonality with Small Business Commissioner peers. This is particularly important if the Ombudsman is to have a strong advocacy role on behalf of small business within the Commonwealth Government.

A corollary of having statutory independence is to require the Ombudsman to provide an Annual Report to the Minister, for tabling in Parliament.

### 12. Title

I acknowledge that the Government committed to the establishment of a 'Small Business and Family Enterprise Ombudsman' prior to the last Federal election. I note that there are many family businesses which are not small by anyone's definition, and query how, if at all, the Ombudsman's role and scope will be limited to those family businesses in need of the Ombudsman's assistance and services.

I also observe that the term 'Ombudsman' will differentiate the role by title from the State Small Business Commissioners. This is unfortunate as the roles are in many ways similar, although scope and some functions can vary. Insofar as dispute resolution functions are concerned, it will be very important to make clear to businesses that (a) the scope of the functions of the Ombudsman and the State Commissioners are distinct, and (b) that the Ombudsman does not offer a 'review' or 'second attempt' or escalation function for matters handled at a State level where a party is not satisfied with the outcome (or vice versa).

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