



**Small Business
Development Corporation**

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**DISCUSSION PAPER - THE SMALL BUSINESS AND FAMILY
ENTERPRISE OMBUDSMAN**

Thank you for the opportunity to provide further input on matters raised in the Discussion Paper on the proposed Small Business and Family Enterprise Ombudsman (hereafter referred to as the "Federal Office").

Earlier this year, the Western Australian Small Business Commissioner (WA Commissioner) provided material to contribute to a preliminary discussion on enhancing the role of the Australian Small Business Commissioner (Submission No 1).

Summary of the main points of Submission No 1

1. Some of the proposals contemplated in the Discussion Paper for the Federal Office align with policy settings adopted in WA. Information on the legislative framework for the WA Commissioner and the Small Business Development Corporation (SBDC) is provided for future reference in the development of functions for the Federal Office.
2. Care should be taken to prevent the Federal Office duplicating activities performed by State-based Small Business Commissioners.
3. Collaborative working relationships are strongly supported between State-based Commissioners and the Federal Office, along with the development of structured information sharing processes.
4. Any extension of responsibilities for the Federal Office will require appropriate and ongoing resourcing within a framework that supports the Commissioner to achieve the objectives of the office (eg independence, appropriate powers).

5. I support the Federal Office providing a concierge service to small businesses to identify the most appropriate dispute resolution service for their circumstances, in so far as access to low-cost resolution is not delayed.
6. Direct provision of alternative dispute resolution services by the Federal Office is only supported for matters arising between small businesses and Commonwealth agencies, at this stage.
7. Ideally, the title for the Federal Office should remain "Australian Small Business Commissioner" but "Small and Medium Enterprise Commissioner" is worth consideration. The inclusion of the term "Ombudsman" to identify the office is strongly opposed.

The SBDC upholds the views presented in Submission No 1 and resubmits a copy for the Treasury to reference in relation to issues canvassed in the Discussion Paper for the Small Business and Family Enterprise Ombudsman (Discussion Paper).

Alignment between the Federal Office and the SBDC

The SBDC can comment from a position of experience on some of the proposals contemplated in the Discussion Paper due to their potential alignment with policy settings already adopted in WA. To this end, Submission No 1 provides extensive detail on the legislative framework supporting the functions of the SBDC¹. Of most relevance for the Federal Office, the SBDC:

- provides information and advice to the (Western Australian) Minister for Small Business on matters pertaining to the small business sector;
- plays a formal role in the WA Government's regulatory impact assessment process, through the provision of advice with a small business perspective to the central agency charged with its oversight, as well as direct assistance to agencies to assess the significance of negative impacts on small businesses (since its commencement in late 2009);
- advocates on behalf of the small business sector to government agencies for favourable policy settings;
- operates an alternative dispute resolution service (ADR) service that is low-cost, non-litigious and tailored to meet the specific needs of small business operators to resolve their business-to-business and business-to-government disputes (since 2012); and
- provides advisory and educational services directly to small business owners.

¹ Unless otherwise stated, the SBDC has been performing these roles, under its legislative framework for 30 years.

As the Small Business Ombudsman and Procurement Unit further develops the role of the Federal Office, the SBDC would be happy to host a visit of relevant officers to WA, to obtain a first-hand understanding of how the various streams of the SBDC support each other in a 'holistic approach' for the benefit of the small business sector.

Consideration of the role of the Federal Office Context and its budget allocation

The SBDC provides the following additional commentary on the 'direct dispute resolution' questions asked in the Discussion Paper, taking into account the budget allocated for the Federal Office of \$2 million per annum, as announced in the 2014/15 Federal Budget papers.

With the SBDC's annual budget for its advocacy, advisory and dispute resolution services in mind, fulfilling the most extensive range of functions canvassed in the Discussion Paper with a budget of \$2 million per annum would be difficult.

As discussed in Submission No 1 at section 1(b), the functions assigned to the Federal Office need to be commensurate with the resources allocated to it. In the SBDC's view, it is preferable that initially, the Federal Office limits its focus to high-priority functions and deliver them well, in proportion with resourcing levels, rather than risk not being able to deliver positive outcomes across a broader number of activities.

Such an approach will reduce unrealistic expectations being raised in the business community that could ultimately result in confusion, delayed access to justice and poor advocacy for the sector; along with uncertainty from public sector officers about the roles of the various Small Business Commissioners (State Commissioners) across jurisdictions, and a consequential dilution of their 'brands'.

Priority areas for consideration should include the provision of:

- information and advice to the Federal Minister for Small Business on matters pertaining to the small business sector, particularly regulatory burden and impact assessment; and
- dispute resolution services that involve Commonwealth Government agencies.

Focus Question - 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?

This question is discussed more extensively in section 3 of Submission No 1, however, the SBDC provides the following points mindful of the budget allocation for the Federal Office announced in the interim and the commentary under "Developing the Ombudsman's own mediation service" in the Discussion Paper.

- Support is provided for the Federal Office providing direct mediation services for small businesses in dispute with:
 - Commonwealth agencies, as a matter of course, noting the benefits that accrue from this when providing advocacy back to Government on behalf of the sector;
 - Interstate and international businesses when the matter has been raised with a State Commissioner and referred to the Federal Office on the basis that this is deemed the most appropriate course of action. Concerns remain about the Federal Office providing services for business-to-business disputes in States and Territories that do not currently fund a State Commissioner.
- In the SBDC's view, the Federal Office mediating interstate and international business disputes, as a matter of course, due to potential benefits that would derive from achieving uniformity of decision making would be outweighed by negative consequences. For example, the Federal Office is not resourced for the volume of disputes that would potentially be received and the costs to small business owners of using a service based in Canberra may be higher. Also, there may be less likelihood of swift resolution due to a lack of detailed knowledge within the Federal Office of state-based marketplaces and legislation. In addition to this, delays may occur while consideration was given to which jurisdiction was responsible or appropriate for the dispute.
- There is merit in the Federal Office providing ADR services for national industry codes. However, the problems associated with higher costs for businesses and less access to hands-on dispute resolution requires further consideration. It might be worthwhile for the Federal Office to adopt an incremental approach to its provision of direct ADR service offerings. For example, commencing with business disputes with Commonwealth agencies in the first instance and over time, and budget permitting, adding ADR services under industry codes.

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

The SBDC's ADR service was introduced as an alternative to more formal court and tribunal proceedings in WA rather than as a duplicate service. It is essentially a voluntary process and does not preclude participants from seeking concurrent assistance from other sources (eg pursuing claims through the courts).

To this end, the SBDC made a conscious decision not to incorporate determinative powers in its ADR service. The power to make binding decisions must always be accompanied by safeguards which ensure due processes are followed and miscarriages of justice do not occur. These safeguards involve extra processes, costs and red tape which work against the provision of a swift, low cost, more informal and less intimidating service that small businesses were seeking.

Further, it was considered that when offering ADR (including government subsidised mediation) for business-to-business and business-to-government disputes, cooperation was less likely with determinative powers.

The SBDC's ADR service has now been operating for two years and during this time there have been a small number of instances where stronger mechanisms to engender greater participation from parties would have been helpful and improved outcomes to disputes.

As a result, the SBDC is of the view that a balance needs to be struck between influencing parties to voluntarily participate in resolving disputes and ensuring that there are consequences for recalcitrant organisations that refuse to provide information in reasonable timeframes or participate in dispute resolution in a meaningful way. These behaviours are invariably to the detriment of small business owners who have insufficient resources to utilise the judicial system.

At the present time, the most powerful mechanism to encourage participation from parties to a dispute that is incorporated into the WA legislation is for retail tenancy disputes. In such disputes, a party is unable to take a matter forward to the State Administrative Tribunal (SAT) without receiving a certificate from the WA Commissioner stating that dispute resolution has not or is unlikely to succeed, or is not a reasonable way forward under the circumstances. The SAT is able to award costs against a party who has not cooperated in the SBDC's alternative dispute resolution processes.

The SBDC notes that other State Commissioners employ a range of mechanisms to encourage participation including 'naming and shaming', making reports to Parliament, compelling information to be provided and compelling attendance for ADR services. A strengthened ability to obtain information from parties in dispute is the area of most interest to the SBDC.

Conclusion

Thank you for the opportunity to provide feedback to this important review.

To discuss these comments or Submission No 1 further, please contact Ms Darcy Bosch 08 6552 3308, darcy.bosch@smallbusiness.wa.gov.au or Ms Jenni Collins on 08 6552 3303, jenni.collins@smallbusiness.wa.gov.au.

Yours sincerely



David Eaton
SMALL BUSINESS COMMISSIONER

3 June 2014

Our ref: D14/660

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Dear Mr Francis

DISCUSSION PAPER ON THE ENHANCEMENT OF THE ROLE OF THE AUSTRALIAN SMALL BUSINESS COMMISSIONER

Thank you for your letter dated 15 January 2014 regarding the enhancement and extension of the Australian Small Business Commissioner's (ASBC) role, announced by the Federal Coalition prior to the 2013 Election and outlined in the attached Discussion Paper.

I welcome the opportunity to provide written feedback at this stage of the consultation process and to input further as the functions for this important role take shape.

Hereafter, I generally refer to the augmented role and office of the ASBC as the "Federal Commissioner" to allow issues to be discussed concisely.

Summary of the main points of this submission

1. Some of the proposals contemplated in the Discussion Paper for the Federal Commissioner's role align with policy settings adopted in Western Australia (WA). Information on the legislative framework for WA's Small Business Commissioner and the Small Business Development Corporation is provided for future reference in the development of the Federal Commissioner's functions.
2. Care should be taken to prevent the Federal Commissioner duplicating activities performed by State-based Small Business Commissioners.
3. I strongly support collaborative working relationships between State-based Commissioners and the Federal Commissioner, along with the development of structured information sharing processes.
4. Any extension of responsibilities for the Federal Commissioner will require appropriate and ongoing resourcing within a framework that supports the Commissioner to achieve the objectives of the office (e.g. independence, appropriate powers).

5. I support the Federal Commissioner's office providing a concierge service to small businesses to identify the most appropriate dispute resolution service for their circumstances, in so far as access to low-cost resolution is not delayed.
6. Direct provision of alternative dispute resolution services by the Federal Commissioner is only supported for matters arising between small businesses and Commonwealth agencies, at this stage.
7. Ideally, the title for the Federal Commissioner's role should remain "Australian Small Business Commissioner" but I consider "Small and Medium Enterprise Commissioner" worth consideration. I strongly oppose the inclusion of the term "Ombudsman" to identify the office.

Background to the Role and Functions of the SBDC and the Western Australian Small Business Commissioner

As the discussion paper considers the matter of a statutory appointment for the Federal Commissioner, I will go into some detail regarding the functions enshrined in legislation for the Western Australian Small Business Commissioner ('WA Commissioner') and the Small Business Development Corporation ('SBDC').

The WA Commissioner is the Chief Executive Officer of the SBDC. The SBDC is an independent statutory authority of the WA Government established under the *Small Business Development Corporation Act 1983 (WA)* ('the SBDC Act') and has 30 years' experience fostering the development and growth of small businesses in this State.

In 2011, the SBDC Act was amended to provide for the establishment of the WA Commissioner and an Alternative Dispute Resolution ('ADR') service for small businesses, modelled on the approach taken in Victoria.

The SBDC focuses on four core activities to support small businesses:

1. Providing advice and information to operators;
2. Delivering an alternative dispute resolution service;
3. Advocating for fair and reasonable trading environments for small businesses to government, elected members and industry; and
4. Contributing expert advice to government agencies on policy settings conducive for a healthy sector.

These activities encompass functions specified within sections 11(2) and 14A of the SBDC Act. Wherever a WA function relates to a function contemplated in the Discussion Paper for the Federal Commissioner, it has been included below for future reference in the development of the role.

Section 11(2)

- facilitate and encourage the fair treatment of small businesses in Western Australia in their commercial dealings with other businesses;
- promote informed decision making by small businesses and to assist them to operate in ways that minimise disputes with other businesses;
- investigate and report to the Minister on the actions of public sector bodies that affect the commercial activities of small businesses;

- assist public sector bodies to:
 - develop legislation, policies and administrative procedures that take into account the interests of small business;
 - improve the capacity of small business to comply with their legislative and other requirements;
 - simplify and minimise small business compliance requirements; and
- investigate and report to the Minister on emerging trends in market practice that have an adverse effect on small business.

Section 14A

- receive and investigate complaints about unfair market practices affecting small business and provide assistance to attempt to resolve those complaints;
- receive and investigate complaints by small businesses about the actions of public sector bodies that affect the commercial activities of small business;
- provide alternative dispute resolution services for small businesses;
- make representations to another person or body on behalf of a small business that has made a complaint;
- perform functions conferred on the Commissioner under any other Act;
- to advise the Minister on any matter related to the functions of the Commissioner.

The ADR Service

The SBDC's low-cost, non-litigious dispute resolution service is tailored to meet the specific needs of small business operators and commenced on 26 March 2012. It focuses on minimising business-to-business and business-to-government disputes by providing information, education, guidance and hands-on assistance and represents an alternative to courts and tribunals.

Experienced SBDC Advisers and Case Managers provide free information and guidance to parties, assisting them to clarify issues in dispute, understand their rights and obligations, identify desired outcomes, and consider options and solutions.

Where a dispute is not resolved after the provision of information and guided resolution, clients are encouraged to attend mediation with the SBDC allocating an independent private-practise, professional mediator to conduct the session (when mediation is considered appropriate to the circumstances). Each party to the dispute pays \$125 to demonstrate their commitment to mediation, with the remainder of the mediator's fee subsidised by the SBDC.

Additionally, in most retail tenancy disputes, a party in dispute cannot take a matter to the State Administrative Tribunal ('SAT') for a determination without first receiving a certificate from the WA Commissioner stating that ADR has failed, is unlikely to succeed or is not appropriate for the case. Specifically, details regarding the conduct of parties during the ADR process may be recorded on the certificate and the SAT may take this conduct into consideration when awarding costs.

The role of the WA Commissioner in relation to retail tenancy disputes and the certification process has been enshrined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA).

Since its commencement, demand for the ADR service in Western Australia has exceeded original forecasts. For the period 2 July 2012 to 10 February 2014, the ADR service has responded to over 3,508 dispute-related enquiries, with approximately one third related to retail leasing. Other significant causes of dispute enquiries raised with the ADR service relate to business-to-business contracts, debt collection (primarily regarding the non-supply or non-performance of goods and services), product liability and trade practices. In total, 696 cases have been escalated to case managers for a higher level of intervention. This more intensive service has consistently achieved a "resolution rate" of over 80%.

Further to this, the ADR service also receives and investigates business-to-government complaints. Under this stream, small business operators are assisted in their dealings with all levels of government, with staff commonly working with clients and relevant agencies to navigate red tape, propose solutions and negotiate outcomes satisfactory to both parties, wherever possible.

By responding to the concerns of individual businesses and negotiating with agencies, the WA Commissioner is able to identify and address matters that are likely to be impacting on whole categories of small businesses (e.g. construction subcontractors, retail tenants), industries or the sector. This service also acts to scrutinise agency dealings with businesses across all tiers of government, identifying best practice processes and any negative consequences for the sector that arise from regulatory settings and engagement. Such information can be used to improve the quality and effectiveness of public sector interactions with the private sector.

The ADR service has handled 66 business-to-government disputes since 2 July 2012 (up to 10 February 2014), with a small number of cases involving Federal agencies and legislation.

In the context of the policy settings and services relating to the WA Commissioner I have outlined, I have considered the issues presented in the Discussion Paper and make the following comments.

1. A Commonwealth-wide advocate for small business and family enterprises

Overlap is likely to exist between the first and fourth responsibilities outlined in the Discussion Paper for the Federal Commissioner (i.e. to be an advocate across the Commonwealth for small and family enterprises and to contribute towards regulation at the Federal level that is small business friendly).

Taking my cue from the matters raised in the paper relating to this function, I understand that it encompasses advocacy and investigation relating to small business concerns across the economy. In my own experience, key issues raised with me by small business operators relate to unnecessarily burdensome regulation and compliance regimes; unfair commercial and industry practices; difficulty finding time for business planning; training and performance evaluation; changes to the economy; and cash flow problems, to name a few.

The SBDC has previously supported the establishment of the ASBC and provided feedback to this effect in the lead up to the service being implemented. I believe that the small business sector in Australia benefits from a dedicated advocate in the Federal arena.

I note that the Discussion Paper highlights the need for the Federal Commissioner to "work collaboratively" with State based Commissioners. I fully support this and applaud the Department of Treasury for recognising the value of this relationship.

While I support expanding the ASBC's role in principle, I believe it is imperative that the role be independent, adequately resourced and avoid duplication of existing services.

(a) Independence

The paper notes that the office of the Federal Commissioner would be most effective if it was seen to be independent and impartial, and that a statutory appointment with security of tenure would assist in this.

In WA, the Commissioner is the Chief Executive Officer of the SBDC, which is an independent statutory authority. Unlike State Government Departments, the SBDC has a Governing Board made up of business people, a dedicated budget allocation (separate from consolidated revenue) and there is transparency to Parliament if the Minister directs the Commissioner/SBDC.

Functionally, I am accountable to the Minister for Small Business and the Board. I am employed on a five year public sector contract and not by the Governor, as is the case in other Australian jurisdictions.

In my own experience, enshrining the role and functions of the SBDC and WA Commissioner in legislation has contributed significantly to the longevity of the agency and its success in achieving good outcomes for small businesses. Some examples relate to policy settings in retail tenancy marketplaces that assist to reduce the power imbalance between landlords and tenants, preserving business relationships by providing timely and inexpensive dispute resolution, accurate advisory services and information delivered throughout the whole State (via the Small Business Centre network).

An ability to reference legislative provisions when conducting our work activities has provided leverage to quickly engage with stakeholders; obtain cooperation from parties in dispute or under investigation; and has boosted the credibility attached to advocacy provided on behalf of the small business sector to elected members, industry associations and across government agencies.

I am of the view that including the functions of the Federal Commissioner in legislation will assist the role to be viewed as impartial and credible.

(b) Resourced with adequate staff and guaranteed ongoing funding

Successfully achieving the objectives of the enhanced Federal Commissioner role will be largely reliant on the office securing funding levels commensurate with the functions it will be responsible for performing.

With an appropriate budget to attract skilled staff, I consider that the role will be well placed within the Federal Government structure to achieve its stated objectives.

In WA, as the Small Business Commissioner and CEO of the SBDC, I have flexibility to assign agency resources to match the economic environment and unique challenges facing the sector at any given time.

If adequate resources are not assigned to the Federal Commissioner, individual small business clients will be likely to experience substandard service and therefore receive limited benefit from approaching the Federal Commissioner's office.

Caution is needed to ensure that the functions assigned to the enhanced Federal Commissioner will achieve the stated objectives within the likely resource allocation. Over promising on the Commissioner's ability to deliver positive outcomes for the sector, is likely to result in a role that lacks longevity in this critical space.

(c) Complementary and not duplicative of State based services

Small Business Commissioners have been appointed in WA, South Australia, New South Wales and Victoria to advocate for, and to provide ADR services to, small businesses. Reports from these jurisdictions suggest that demand for the ADR services is strong and that there is a high success rate in resolving disputes.

Development of the role of the Federal Commissioner should compliment, not duplicate, the services that small businesses can access at State levels.

Of particular concern to me is the provision of ADR services, especially as it relates to jurisdiction shopping and the capacity to create confusion over where to seek help, resulting in delaying a business operator from accessing assistance.

My concerns about duplicated service provision by governments will be discussed in more detail under the relevant functions outlined for the Federal Commissioner as set out by the Discussion Paper.

2. A "single entry point" for Commonwealth programmes and support.

I support the finding made by the Productivity Commission in its review of regulator engagement relating to the need for a multi-channelled strategy to cater for the diversity of the small business sector.

I believe that creating a single entry point for small businesses to obtain information about relevant Commonwealth support programmes, coupled with a referral service that would allow business operators to receive assistance from Commonwealth agencies that was most appropriate to their needs, would benefit the sector.

It is my understanding that there are over 160 Commonwealth programmes providing support to small businesses. I imagine that keeping abreast of the programmes offered by the Commonwealth Government; and the myriad of teams within agencies tasked with advising businesses and supplying them with relevant, up to date information; would be no small task.

For this reason, I believe the proposed single entry point should provide advisory services to small businesses on Commonwealth activities only, in the first instance. Perhaps an independent assessment of the usefulness of the service for small business clients, as well as the accuracy of referrals made and advice provided, could be conducted in time, with a view to adding State and Territory activities upon a favourable assessment.

I am supportive of initiatives that minimise the complexity associated with small business operators seeking out relevant advice from all tiers of government and the time this takes. A whole-of-government service that reliably delivered accurate, up to date and comprehensive advice that was specific to a business's circumstances, would amount to vast savings for businesses across Australia.

While technological advances make it increasingly easy for large volumes of data to be searched, collated and analysed quickly, formal information sharing processes (with long term commitments from all parties) are required if accurate advice is to be supplied. Even more difficult is keeping advice up to date in specialised advisory areas like retail tenancy, where State-based legislation governs the relationships in the marketplace and local knowledge can save participants from making costly mistakes.

In July 2010, the SBDC provided comment on the Small Business Support Line as part of a Department of Innovation, Industry, Science and Research review at the time. In this feedback, the SBDC raised issues regarding the quality, consistency and reliability of advice provided to small business clients, and it was our view that significant improvements to the Small Business Support Line were needed. Of particular concern was the lack of local knowledge by Small Business Support Line advisors in relation to applicable Western Australia laws.

If the single entry point proposed will be providing advice to the small business sector on State-based programs and services, I would seek for SBDC to be involved in the development of formal processes between the Federal Commissioner and State and Territory agencies. Strong working relationships between the Federal Commissioner and State-based Commissioners, supported by frequent, scheduled liaison and formal information sharing processes will be required for the service to be of meaningful assistance to small business operators.

Care must be taken not to duplicate existing and well established Commonwealth and State services.

In the past, the SBDC has raised concerns about duplicative and/or competing services provided by the State and the Commonwealth Governments. For example, the Commonwealth-funded Business Enterprise Centre (BEC) network, which aims to position itself as the "Principal support for small and micro business in Australia" (BEC Australia Strategic Plan 2011-13) has, in the past, directly overlapped with the services provided by the State Government supported Small Business Centre network in Western Australia.

As with all services offered by government, it is crucial that adequate marketing and promotion targeted for small business operators be conducted.

3. A concierge for dispute resolution

Direct service provision of ADR

The Discussion Paper contemplates the Federal Commissioner providing ADR services directly to small businesses and gives three examples of the kind of disputes that the Federal Commissioner could become involved in, being:

- Business-to-Commonwealth Government entity dispute;
- Interstate or international business disputes; and
- Disputes where the party is a corporation.

If the Federal Commissioner is to provide dispute resolution in any of the three areas listed above, it must be done in such a way that duplication with State-based services is avoided.

Of particular concern is the possibility of a model that introduces the opportunity for small businesses to “jurisdiction shop”. For example, if a dispute was dealt with by the WA Commissioner, would an affected party be permitted to seek further (or concurrent) assistance from the Federal Commissioner if it believed a more favourable outcome could be achieved? More thought needs to be given to the impact on businesses of accessing multiple services and the benefits of ‘closure’ in relation to disputes.

The SBDC does not receive a large volume of disputes relating to Commonwealth agencies, so I make the following comments from a conceptual viewpoint rather than from one of experience. I believe that the Federal Commissioner would be in a strong position vis a vis the State-based Commissioners to provide small businesses with an effective avenue for redress for disputes arising with Commonwealth agencies.

Resolving matters between individual small businesses and Commonwealth agencies will assist the Federal Commissioner to gain insight into regulations and compliance processes that are problematic for the sector. As has been the case in WA, where I have responsibility for these dual roles, such insight will assist the Federal Commissioner to provide more effective advocacy to Government for the sector.

I do not support the Commonwealth having jurisdiction over small business related disputes where one party is a corporation for two reasons. The first I have mentioned above and relates to duplication of services. The second reason is that I find it difficult to envisage a centralised service reproducing the same level of success as the State-based services involving corporations due to:

- time differences across locations causing delays in accessing services and resolution (e.g. Canberra and Perth);
- potential travel costs for disputing parties;
- less opportunity for face to face interactions;
- reduced knowledge of local circumstances (e.g. geographical, legislative, social and economic differences); and
- the difficulties associated with the volume of disputes the Federal Commissioner might become responsible for.

The cornerstone of the success of the WA model is that WA-based small businesses are assisted by a WA-based agency with knowledge of the local economy and operating environment. Small businesses receive immediate assistance, as well as up to date, accurate information and advice that is relevant to the local area in which they operate. I do not believe that a Commonwealth-based ADR service could provide the same level of assistance or quality of advice as a locally based service.

In relation to interstate or international business disputes, I have similar concerns to those outlined above but I can conceive of circumstances where this would be helpful and preferable for disputing parties. I would be happy to consider this further to ascertain how matters might be referred to the service best placed to conduct ADR, in consultation with other State-based Commissioners.

As the Discussion Paper rightly points out, there is a need to take into account constitutional issues when determining the Federal Commissioner's ability to provide direct dispute resolution services to businesses. I am also conscious that not all State and Territory Governments have Small Business Commissioners and ADR services, however, I do not believe that the Federal Commissioner should or could operate a service in these situations

Concierge service

I am supportive of the Federal Commissioner providing a concierge service to direct small business operators to ADR services available to them and appropriate for their needs, with the proviso that it does not cause delays to business in accessing services. In the context of disputing parties, any delays can result in a small business missing the opportunity to resolve a matter. Generally, the longer it takes to obtain assistance, the more likely it is that the relationship between the disputing parties will deteriorate.

Timely engagement with disputing parties has been critical to the success of the SBDC's hands-on, practical, low-cost ADR service. The ADR model adopted by the SBDC is nimble and strives to preserve business relationships by getting disputing parties working together again (as no dispute is satisfactorily resolved if the business relationship is destroyed in the process).

When developing processes and procedures for the concierge service, a focus on client experience and speedy resolution of issues will be crucial. I believe that for the concierge service to be successful it must be well resourced, have up to date information and have sound mechanisms for referral of cases in place.

These factors could be addressed through a formalised Memorandum of Understanding between relevant entities, particularly in relation to setting out respective roles and responsibilities, the complementary nature of ADR services, the mechanisms to share information and refer disputes, and the development of small business research and information material.

I would welcome the opportunity to comment on the concierge function further as the Federal Commissioner model progresses.

4. A contributor to the development of small business-friendly Commonwealth laws and regulations

The small business sector would benefit enormously from small business friendly Commonwealth laws and regulations. Further to this, in my time as WA Commissioner I have come to understand that what most heavily impacts on businesses is the manner in which regulation is enforced and administered (e.g. compliance activities that are not commensurate with risk, approval delays, a lack of clarity about what is required).

I support the Federal Commissioner being provided with sufficient powers and responsibilities so as to be effective in reducing the impacts of Commonwealth legislation, regulation and agency compliance processes for the small business sector.

I do not support the Federal Commissioner reporting to all Australian Parliaments on the impact of State and local regulation on small businesses and believe such a function would be practically and constitutionally problematic. However, future discussions amongst Commissioners to obtain better oversight of all local, State and Commonwealth regulations impacting on small business across Australia would be supported as the Federal Commissioner role develops.

The creation of a database of information on red tape matters raised by business to State Small Business Commissioners regarding Commonwealth regulation could also assist in informing the Federal Commissioner's advocacy role. If all State Small Business Commissioners fed information to this database, the Federal Commissioner would have access to a rich overview of how Commonwealth regulation might be impacting on small businesses across the country.

It is not clear at this stage what the relationships will be between the Federal Commissioner and other Commonwealth areas playing a functional role in the reduction of red tape on businesses (e.g. regulatory gate keeping processes). To maximise beneficial outcomes to the small business sector strong links with, or oversight of, such processes is required. For example, in WA, the SBDC has a formal role in the State Government's regulatory impact assessment process.

I have supported the Federal Commissioner providing dispute resolution for small business operators dealing with Commonwealth agencies. Based on the WA experience, conducting business-to-government dispute resolution has been beneficial in the performance of the SBDC's regulatory gatekeeping role. Over time the agency has built up a practical understanding of how new/amended regulations can and do impact on small businesses.

In order to maximize good outcomes for the small business sector, I recommend that the Federal Commissioner have oversight of the Commonwealth-based programs and legislation affecting small business; and that relationships between relevant positions are clarified and formalized.

5. Other - Changing the title of the ASBC to the Small Business and Family Enterprise Ombudsman

Using the term Ombudsman

I strongly oppose using the term "Ombudsman" in the title of the proposed enhanced role.

Traditionally an Ombudsman acts to investigate maladministration by a public authority. It does not provide business advice and assistance in resolving business problems that are not 'dispute related'.

I am of the opinion that the role of the Small Business and Family Enterprise Ombudsman proposed in the Discussion Paper, does not fit into a 'traditional' definition of Ombudsman.

I am concerned that the use of the term Ombudsman may be problematic for small business operators, particularly those with a preconceived notion of what a 'traditional' Ombudsman does.

Small business owners may miss out on opportunities to obtain the assistance from the Federal Commissioner, because they may not link the functions that are envisaged for the role, such as the provision of general business advice and information, with the title of Ombudsman. This would result in the underutilization of the Ombudsman's services by the target market it is established to service.

I understand that creating a "Small Business and Family Enterprise Ombudsman" was an election commitment and that the Federal Government may be keen to progress with this model. I also understand the Federal Government's desire to create a role that is perceived by the public as independent and impartial, hence the use of the term "Ombudsman".

In my opinion changing the name of the role in order to influence public perception is misguided. Altering the name of an established role and supporting agency is more likely to cause confusion amongst the business community, as well as private sector and government advisory agencies providing advice to small business owners. Further, it is not clear how the roles of the existing Commonwealth Ombudsman and the proposed Federal Commissioner would be delineated.

I believe that alternatives that deliver better outcomes for small businesses but for less cost should be considered. For example, keep the title of ASBC and direct resources toward better informing the community about the role of the ASBC, its supporting agency and how it can assist small businesses. Significant resources will be required to change current branding and market the role and organisation to make the public aware of this name change.

Family Enterprise

While it is understood that specifying "family enterprise" in the title of the new role is an election commitment, it could result in extending the 'jurisdiction' of the role to large corporations, so long as they meet the definition of "family enterprise or business". In turn, this may lead to fewer services specifically tailored to meet the needs of small businesses and reduced advocacy to government on matters of most concern to smaller businesses.

It is possible that larger, sophisticated and well resourced “family” businesses could take up a disproportionate amount of the Federal Commissioner’s time and attempt to influence the Federal Commissioner to advocate on their behalf to Government.

Further, if the Federal Commissioner is given a dispute resolution role (as is raised in Point 3 of the Discussion Paper) it is possible that ADR services that were arguably intended for smaller enterprises could be utilised by larger and more powerful corporations.

That being said, I am of the opinion that these concerns should not be overstated. In practice, large and powerful corporations with a business dispute are likely to use the legal system as a first port of call to resolve the dispute and to have several avenues of influence with Government and therefore not be reliant on the Federal Commissioner to raise their concerns.

However, I believe such concerns are worth noting given the differences that can be present between matters seen as a priority by larger corporations when compared to smaller businesses.

These potential issues may be avoided by using an appropriate definition of “small business or family enterprise” in the legislation when defining the role of the Federal Commissioner.

Any definition used should be broad enough to capture a range of businesses whilst giving the decision maker the option to restrict the provision of services, where it is appropriate to do so. A good example of such a definition can be found in section 3(1) of the *Small Business Development Corporation Act 1983 (WA)*:

small business means a business undertaking —

- (a) which is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the *Corporations Act 2001* of the Commonwealth and which —
 - (i) has a relatively small share of the market in which it competes; and
 - (ii) is managed personally by the owner or owners or directors, as the case requires; and
 - (iii) is not a subsidiary of, or does not form part of, a larger business or enterprise; or
- (b) which is declared by the Governor by Order in Council pursuant to subsection (2) to be a small business for the purposes of this Act.

This definition enables the WA Small Business Commissioner to determine whether advisory and dispute resolution services should be provided to a particular party, regardless of whether they technically meet the traditional “less than 20 employees” definition of small business.

As discussed earlier, I do not believe that the Federal Commissioner's title should change from the "Australian Small Business Commissioner". However, I am of the opinion that the Federal Commissioner should be a genuine voice for the nation's small and medium enterprises and would consider an amendment to "Small and Medium Enterprise Commissioner" if a change is necessary.

"SME" is in common usage in Australia and overseas; with industry bodies, government officers and business owners identifying that SMEs have their own challenges, similar characteristics and are quite distinct from large corporations. In addition, the public, industry bodies and the majority of government agencies generally find it hard to differentiate between businesses that are 'small' or 'medium'. Specifically mentioning SMEs in the Federal Commissioner's title will ensure these services are applicable to a wide range of businesses across Australia and I think that it appropriate.

I believe including "family enterprise" in the title to be redundant, however, if this is not negotiable, I do not believe it to be a significant issue if the emphasis for the Federal Commissioner's services and advocacy remains on small and medium enterprises.

Conclusion

Thank you for the opportunity to provide my feedback to the review of the ASBC's role. As the role and supporting model is further developed I would welcome the opportunity to provide additional input.

Yours sincerely

David Eaton
SMALL BUSINESS COMMISSIONER

10 March 2014