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The Small Business and Family Enterprise Ombudsman

Submission from Independent Contractors Australia
in response to Treasury Discussion Paper of April 2014
7 May 2014

1. Summary

General

ICA supports:

- The creation of a Small Business and Family Enterprise Ombudsman (SBO).
- Statutory appointment.
- The definition of a small business should be at the discretion of the SBO.
- The SBO's powers should cover ALL Commonwealth entities, including the ATO.
- The avoidance of overlap with the states' Small Business Commissioners.
- But no 'leakage' of authority due to artificial demarcation (for example, between the existing Commonwealth Ombudsman and the proposed SBO).
- The SBO's powers should cover small business people engaged through 'third party intermediaries'.
- The SBO acting as a red-tape watchdog.

Dispute resolution

ICA strongly supports:

- Dispute resolution as the most important power of the SBO.
- That it be mandatory for government entities to refer disputes to the SBO.
- That referral of disputes to the SBO should be included in all government contracts.
- Compulsory attendance at dispute resolution.

Fair contracts

ICA strongly supports:

- A specific SBO power to review Commonwealth contracts to ensure they comply with fair contract principles and practices.
- An extension of the SBO's power so that it may require changes to Commonwealth contracts to ensure 'fairness'.

ICA does NOT support

- Restriction of the SBO's powers by limiting the SBO to making 'non-binding' administrative decisions.

2. Overview

Independent Contractors Australia supports the creation of a Federal Small Business and Family Enterprise Ombudsman and recommends proceeding with the initiative so that the SBO is fully operational well before the end of 2014.

The Treasury discussion paper covers the issues with common-sense analysis.

3. Dispute resolution

This is ICA's main interest.

Enabling cheap, quick and non-legalistic processes for dispute resolution for small business people significantly reduces the transaction costs and the risk-profiling of being in business. This creates a better commercial environment for business activity and entrepreneurial endeavour, thereby aiding economic growth.

Conceptually, the cost to the Commonwealth of providing such dispute resolution services is readily offset by the reduced costs of litigation through the courts.

Care should be taken to ensure that the SBO's powers and activities do not overlap with the states' Small Business Commissioners' activities. The discussion paper covers this issue well. As a matter of principle, dispute handling for small business people should be kept at the local level as much as possible—that is, at the level of the states. The SBO should fill any gaps, especially with disputes involving Commonwealth entities.

- The SBO should have dispute-resolution jurisdiction in relation to Commonwealth entities in their dealings with small business people.
- This should include disputes that small business people have in their dealings with the Australian Taxation Office. ICA is happy to discuss this further.

- It should be mandatory for Commonwealth entities to
 - Refer an unresolved dispute to the SBO early in a dispute process.
 - Refrain from engaging lawyers or taking legal advice until such time as the SBO has intervened in the dispute.
 - Advise small business people that any disputes will be referred to the SBO. Such advice to be provided at the point of engaging with small business people to undertake work.
 - Attend a dispute-resolution process if directed to do so by the SBO.

To ensure that Commonwealth entities give practical effect to the foregoing, it should be mandatory that, in all government contracts with small business people, the supply/services agreement contains a dispute-resolution clause requiring referral to the SBO as a first step if a dispute cannot be resolved directly between the parties.

4. Defining a small business

Definition of a small business should be at the discretion of the SBO, as is the case with the states' Small Business Commissioners.

5. Fair Contracts

We agree with the following statement from the discussion paper:

A key difference in the Ombudsman's advocacy role compared to that of the Australian Small Business Commissioner would be the addition of powers to allow allegations of unfair treatment and practices to be formally investigated.

But we want the SBO's powers to be more specific.

The Federal government has made a commitment to introduce fair contract laws for small business people. That commitment is to have the same protections that were made available to consumers in 2010 by amendments to the *Trade Practices Act* also made available to small business people in their commercial transactions with larger organizations (including governments). The consumer fair contract laws state the following:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4154%22>

Part 2—Unfair contract terms

2 Unfair terms of consumer contracts

- (1) A term of a consumer contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.

3 Meaning of *unfair*

- (1) A term of a consumer contract is ***unfair*** if:
 - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- (2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
 - (b) the extent to which the term is transparent;
 - (c) the contract as a whole.
- (3) A term is ***transparent*** if the term is:
 - (a) expressed in reasonably plain language; and
 - (b) legible; and
 - (c) presented clearly; and
 - (d) readily available to any party affected by the term.
- (4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

ICA believes that when government entities enter into commercial contracts with small business people they should be required to comply with fair contract laws as identified above. We submit that the Small Business Ombudsman should have a specific legislative remit to inspect, review and require change to all Commonwealth-related contracts to ensure compliance with fair contract laws. This particular power of the SBO should be in addition to, and not depend on, the passage of small business fair contract legislation. As a matter of principle, the Commonwealth should be a model of behaviour when it comes to engagement with small business, and it should be seen as a leader in the community on this issue. A requirement to comply with fair contract principles and practices, with the SBO having oversight authority, would give practical substance to such a principle.

6. Third Party Contracts

When government agencies engage small business people, particularly independent contractors, it is common practice for that engagement to be secured through a third party. (This often happens in the IT sector, for example). Typically, this is conducted through a labour hire or 'on-hire' style arrangement, where the engaging intermediary is registered or pre-approved on a panel. That is, the government department uses the services of an individual self-employed person but doesn't have a contract directly with that person.

ICA has been involved in assisting several individuals who have had contractual disputes with government agencies who have been working under such arrangements. Typically, the government agency is working through a standard form federal government contract organized through Centrelink. (Why Centrelink we don't know!) Our experience is that these federal government standard form contracts are entirely unfair and would not pass an assessment of 'fairness' under the laws described earlier. Further, when a dispute arises, the government agencies spend considerable money on lawyers who argue that they (the agencies) have no involvement in the dispute because they do not have a contract with the individual who was working for them.

We do not question the legitimacy of engaging people through third party intermediaries. It's often a good commercial practice. However, when disputes occur, it exposes small business people to a process of legal 'subterfuge' when government agencies seek to avoid their responsibilities.

The Small Business Ombudsman's powers should extend to reviewing and, where necessary, requiring changes to the contracts and engagement circumstances of small business people engaged by government entities through third party intermediaries. The SBO's power of dispute resolution should extend to such third party engagements.

7 Appointment

ICA believes that this should be statutory.

8. Red tape reduction

We support the SBO being a ‘red tape’ watchdog with the power to initiate red-tape reduction exercises. ‘Red tape’ regulations are always created with the best of intentions. It’s natural that bureaucracies will create processes that suit their administrative purposes but the practical implications in terms of cost and the complexity of compliance are often overlooked. The Small Business Ombudsman, along with the states’ Small Business Commissioners, are uniquely placed to understand the implications of red tape for small business people and therefore to push for practical and sensible reform processes.

9. Responses to discussion paper statements

(Discussion paper statements in *italics*)

ICA endorses the SBO’s key responsibilities described as:

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

ICA supports the avoidance of overlapping roles;

The role of the Ombudsman should be complementary to, and avoid overlap with, the roles and responsibilities of other ombudsmen, the state small business commissioners and the services provided by state and territory governments where there are no small business commissioners. This will provide an efficient and appropriate service that minimises confusion for small businesses about which office they should approach for assistance.

Critically, the Ombudsman’s services must, where possible, avoid duplicating existing dispute resolution services, such as those offered by state small business commissioners, various ombudsmen bodies, regulators (such as the Australian Competition and Consumer Commission), community justice centres, dispute resolution centres, industry associations, private entities and industry codes of conduct.

However, a note of caution needs to be sounded. If the Commonwealth supplies free dispute-resolution services to those states which don’t have a small business commissioner, this creates an incentive for such states not to offer the services themselves.

We support these powers:

□ Examples of actions that would require legislative powers include:

- *investigating small business complaints, including obtaining information from parties;*
- *providing gathered information to other Commonwealth agencies and regulators (including but not limited to the ACCC and ASIC) where those agencies are better placed to address a complaint;*
- *compelling parties to attend mediation before approaching a tribunal or court;*
- *imposing financial costs associated with non-attendance at scheduled mediation; and/or*
- *making administrative decisions (non-binding).*

and

- *obtaining information from parties, with powers to enforce compliance with a lawful direction from the Ombudsman;*

where

the Ombudsman's own mediation service could focus on:

- *Disputes with Australian Government agencies.*
- *International business disputes.*
- *Interstate business disputes.*
- *Disputes under industry codes of conduct.*

Note, for clarity: The SBO's jurisdiction should extend to ALL government agencies, including regulators and government business enterprises.

Note on administrative decisions: We do question, however, the SBO being limited to making only 'non-binding' administrative decisions. This would give the SBO the (public relations) appearance of doing something for small business people while still permitting government agencies to ignore the SBO's decisions. Under such circumstances the SBO's office would have the authority of a wet lettuce and be widely viewed as a joke!

In particular, ICA supports powers to require attendance:

There are a range of other powers that could be conferred to the Ombudsman to encourage parties to attend mediation:

- *The Ombudsman could use a mandatory referral system, where certain types of disputes would require a certificate from the Ombudsman before the dispute could be dealt with by a tribunal or a court. This would be similar to retail shop lease disputes in Western Australia, where applications to the State Administrative Tribunal require a certificate from the Western Australian Small Business Commissioner.*
- *The Ombudsman could 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.*

ICA does have serious concerns about the following:

The proposed Ombudsman would not have a role in investigating small business complaints regarding maladministration by Australian Government agencies. This function is already carried out by the Commonwealth Ombudsman.

Maladministration is often at the heart of commercial disputes. For example, a delayed payment of an invoice may be the result of poor administration by the Commonwealth, but the result for the small business person is the same 'pain' as if it's a 'dispute'. The locking in of demarcation issues as to 'dispute' or 'maladministration' under the roles of the existing Commonwealth Ombudsman and the proposed Small Business Ombudsman will inevitably create confusion, complexity and delays in resolution. Further, such demarcation would be a major excuse for government agencies to ignore the jurisdiction of the Small Business Ombudsman.

Instead of legislative attempts to prescribe demarcation issues, we submit that possible cases of contested demarcation to be settled by the common sense of the two Ombudsmen involved.