

Submission
Proposed powers of the New South Wales Small Business Commissioner.
27 July 2012

1. ICA endorses and supports the proposed powers.

Independent Contractors Australia strongly supports the proposed model for the NSW Small Business Commissioner as outlined in the Consultation Paper 'A Legislative Framework for the NSW Small Business Commissioner' released in June 2012.

http://www.smallbusiness.nsw.gov.au/data/assets/pdf_file/0011/23222/SBC-Legislation-Consultation-Paper_18-June-2012.pdf

If implemented, the proposed legislation will provide small business people a considerable power balance with big business/government that is currently lacking. This will improve the business environment for all businesses in New South Wales. It is an important economic reform initiative by the government.

ICA encourages the NSW government to proceed with legislation as outlined in the Consultation Paper.

2. Overview

Self-employed, small business people are in a consumer like situation when it comes to their commercial arrangements with large businesses and the government sector.

A primary problem is that when small business people are in a dispute with a larger organization they do not have the financial capacity to cover the legal costs of securing their commercial contract rights. In effect the theory of commercial contract law (ie: freedom and equality under contract) fails to have application to small business people because of the significant cost of the legal system.

This creates dysfunction in the economy. The outcome is diminished commercial trust where small business people engage in fewer commercial transactions because of unreasonable and uncontrolled risk.

An important process for addressing this is to have available dispute resolution arrangements that are comparatively cheap, quick, minimize legalities and keep the focus on commercial outcomes. However a balance must be struck in that parties to a dispute should not be denied their right to access the courts.

Our assessment is that the proposed powers of the NSW Small Business Commissioner achieve this balance. The powers would

- Deliver a robust mediation service with real encouragement to large organizations to participate in mediation and seek commercial outcomes.

- Not deny parties their ‘day in court’ should they seek such action.

The proposed powers of the SBC will contribute to a better business environment for all business activity in NSW because it will provide a practical, common sense dispute resolution mechanism that will enhance commercial trust and confidence.

3. Background; The Victorian experience

ICA has observed, supported and been involved with the Victorian Small Business Commissioner since its inception in 2004. It is the model upon which the NSW SBC is based. The Victorian SBC has been hugely successful in resolving disputes. However there is evidence that some large firms and government organizations snub the mediation process. They instead effectively assert their preferred position based on their capacity to intimidate smaller parties ignoring mediation opportunities.

The proposed NSW powers will be an improvement on the Victorian SBC model. The proposed powers will make it difficult for large businesses and government organizations to snub a NSW SBC mediation process. It will push large organizations to focus on the commercial facts but still give them the ability to litigate should they wish.

4. Comment on specific proposals.

Below is a summary of the key proposed powers contained in the Consultation Paper and ICA’s responses.

4.1 Proposal; Appointment: That the appointment of the SBC be by the NSW Governor. In other words, that the SBC is independent from the public service.

- *ICA response: Strongly supports.* This is the model in Victoria and is essential if the SBC is to be truly independent when assisting with disputes, particularly disputes involving state or local government entities.

4.2 Proposal: Initiate Investigations: That the SBC have the power to investigate possible unconscionable conduct or unfair practices against small business with or without complaints being lodged.

- *ICA response: Strongly supports.* Frequently small business people are fearful of lodging complaints due to perceived possible retaliation from the larger organization. The ability of the SBC to discover a problem and to initiate investigation is important to resolving potential issues.

4.3 Proposal: Requiring information or answers: That the SBC can require a party to a dispute to provide information or answer questions.

- *ICA response: Strongly supports.* This is a key increase in the NSW SBC powers above that of the Victorian SBC model. We see this power as highly important. It is the key power that ensures that large organizations realize the mediation process is serious and that they are required to have a level of involvement. That is, large organizations will not be able to snub the mediation process. We believe it will be rare for the SBC to need to exercise this but rather it will encourage large organizations to voluntarily enter mediation.

4.4 Proposal: Mediation not affect court action: That what occurs in mediation is confidential and cannot be used in any possible court proceedings.

- *ICA response: Strongly supports.* This is an essential limitation on the mediation parameters that enhances the viability of the mediation process giving it an appropriate balance. With this limitation, parties in mediation can approach the process with confidence that anything they do or say does not potentially prejudice any position they may take in a litigation process should mediation fail. This is likely to result in encouraging parties to retain a focus on commercial realities thus increasing the chance of successful mediation.

4.5 Proposal: Public warnings: That the SBC can issue public warnings about unfair practices.

- *ICA response: Strongly supports*

4.6 Proposal: Legal proceedings and 'collective' issues: That if the SBC thinks significant unfairness has occurred and mediation has failed, the SBC can intervene in or initiate legal proceedings for small businesses including cases covering a 'collective' issue.

- *ICA response: Very strongly supports.* This proposal gives the SBC the real 'teeth' required to even out the power imbalance between small business people and large organizations. It is anticipated that it's a power that the SBC would rarely need to use. Further, when used it would only be in cases of assessed extreme unfairness directed toward a small businessperson (or people) by a large organization. The power, quite simply, ensures that a small businessperson would access a similar level of financial and legal resources to argue their case in court to that of the resources of a large organization. This power, again, would encourage the large organization to be focused on commercial common sense. Further, enabling the SBC to conduct a 'collective' action, again evens out any power imbalances thus encouraging a focus on commercial common sense.

4.7 Proposal: Government bodies: That the SBC will be able to enter agreements with government bodies which commit a government body to enter dispute mediation if requested by the SBC. Further, that the SBC has the ability to investigate state and local government treatment of small businesses and issue reports.

- *ICA response: Strongly supports.* This is an essential power if the operations of the SBC are to have any real meaning. In providing the SBC this power the NSW government is giving the strongest, tangible demonstration possible of its genuine commitment to small business people. The government is effectively saying that in its commercial dealings with small business people it is prepared to apply to itself the same standards it expects of the business community. This is as it should be and reflects a mature approach to governance standards. Further, governments can have a powerful influence on private sector commercial behaviour by setting an example. Implementing this proposal is a case of government saying 'do what we do' as well as 'do what we say'.

4.8 Proposal: Big Business- small business friendly. That the SBC will be able to register big businesses as 'small business friendly', by big businesses undertaking to treat small businesses fairly and to engage in mediation for dispute settlement.

- *ICA response: Strongly supports.* This is the ‘carrot’ that goes with some of the ‘sticks’ included in the Consultation Paper proposals and impacts positively on large organizations branding. Brand value is of highest importance to large private sector businesses. Being, and being seen to be ethical, honest and fair is core to such branding. With the SBC having the capacity to enhance business branding, this will reward positive behaviour toward small business people and encourage better business.

4.9 Proposal: Collective bargaining That the SBC can assist groups of small businesses to engage in collective bargaining with large businesses.

- *ICA response: Strongly supports.* ICA has monitored several collective bargaining applications made to the ACCC by small businesses. We observe that the process is complex and requires specialized legal assistance which is outside the normal scope of most small business persons to organize. The provision of assistance by the SBC to small businesspersons to assist with collective bargaining would enable more small business people to access this process.

4.10 Proposal: Codes of Conduct. That the SBC can develop and administer codes of conduct for specified industries.

- *ICA response: Supports with some qualifications.* Codes of conduct can and should be applied in specific industry sectors or a case-by-case basis. However there are some issues to be considered.
- The major concern is that a proliferation of codes across all states will result in more red tape affecting small business not the reduction of red tape. Further, business activity should preferably be embraced within general frameworks that all small businesses can know and understand easily. If industry codes proliferate across the states, inconsistency and confusion is likely to occur.
- As an overarching principle a general ‘code of conduct’ could be considered for all business activity that captures the bulk of business relationship issues in a generic way. That is, the scope of activities of the Small Business Commissioner should be as broad as possible so that most business issues are covered within the general powers of the SBC. The proposed powers of the NSW SBC do just that. In ICA’s view it is hard to conceive of any specific industry issue that would not be covered by the proposed powers.
- However, wherever there are specific industry features and issues that cannot be handled under the SBC general powers it would be preferable for codes to be developed and applied at a national level through the ACCC with the NSW SBC utilizing the national code. Taking this approach improves the ability for consistency making business requirements easier and simpler to understand.
- By way of background the debate over codes of conduct, and the push to develop these at the state levels has been driven by dissatisfaction within the franchisee sector. That is, problems in the franchise sector has heavily ‘coloured’ the debate over codes of conduct. By way of summary;
 - A national franchising code of conduct has been developed and applied with a dispute resolution procedure in place. However intense criticism

of the code and the dispute resolution process has come from the franchisee sector. The allegation is that the national franchise dispute resolution process is ineffective against franchisors who break the code. Hence there has been a push to create state-based franchise codes to overcome the failure at the national level.

- The debate and push for state-based codes has been particularly intense in Western Australia and South Australia with extensive parliamentary review occurring in both states. Considerable evidence has been presented that the national franchise code operates more as a public relations exercise than a genuine code enabling and enforcing fair behaviour. In observing the debates in SA and WA, ICA believes that many of the concerns raised by franchisees can be addressed through an SBC process if the SBC has strong enough powers. The NSW SBC proposed powers match the standard that ICA believes would address many if not most franchisee concerns. In particular the following powers are important
 - a) the ability of the NSW SBC to initiate action without receiving complaints
 - b) the NSW SBC being able to act for a collective and
 - c) the NSW SBC being able to initiate legal action.

- It is noted that the national franchise code is due for review (2013?). We offer the following view as a model moving forward.
 - a) Franchisees are able to access robust dispute mediation at the state level through the NSW SBC as proposed.
 - b) The NSW SBC makes use of the national franchise code as a standard of expected behaviour when conducting mediation.
 - c) The NSW SBC initiate collective action to the ACCC, or courts on behalf of franchisees where it is considered the code has been breached and mediation has failed.
 - d) The NSW SBC liaise closely with other state SBCs to assess the effectiveness of the national franchise code. The NSW SBC make representations to any review of the national franchise code based on experiences managing franchise mediations.
 - e) If a review of the national franchise code does not resolve the perceived weaknesses in the national code and its processes, NSW could then consider a state based franchise code.

This suggested process of franchise dispute resolution and codes would be the suggestion for application across other industry sectors where codes are considered necessary.

Supplement to the submission

The following article is an opinion piece by Independent Contractors Australia Executive Director and provides a background view to the broader debate over contract law reform and how the proposed powers of the NSW SBC fit within the wider debate.

LEGAL AFFAIRS

Commissioners review of contract law helps the small guys get a fair go

BY: KEN PHILIPS From: [The Australian](#) July 20, 2012 12:00AM

<http://www.theaustralian.com.au/business/legal-affairs/commissioners-review-of-contract-law-helps-the-small-guys-get-a-fair-go/story-e6frg97x-1226430365656>

THE regulation of business-to-business contracts is undergoing changes that will, for some, challenge sacred-cow ideas about the law and economics.

At the high policy end, the federal Attorney-General's department is conducting a review of contract law.

However, if the AG's review results just in further tuning of complex legal issues and processes, it won't really have done much for the community.

Contract law is about the practicalities of doing business. The social task of the law in this respect is, or should be, to support the commercial bargains into which people choose to enter.

This simple idea -- freedom to contract -- is at the core of commercial contract law and is central to the functioning of market economies. Contemplation of how freedom to contract actually operates mostly takes a big business perspective; that is, contracts involving lots of lawyers.

The concept, however, comes unstuck in practice when small businesspeople engage in commercial contracts with large organisations, both business and government.

The reality is that much of the functioning of market economies (at the small business end) is poor because the theory of contract law fails to operate in practice.

However, without a great deal of fanfare, that dysfunction is progressively being addressed. To this purpose attention needs to be focused on the small business commissioners across the nation. In particular, the proposed powers of the NSW Small Business Commissioner have set new benchmarks.

When a small businessperson conducts business with a large organisation, say as a consultant, the common practice is that the large client requires the small businessperson to enter a contract drafted by the client.

These contracts invariably deliver contractual power and advantage to the client. If there is a dispute under the contract, the large organisation frequently applies its superior legal and financial resources to enforce its desired outcome. Small businesspeople cannot afford the legal cost of securing their contractual rights. The theory of the law exists, but the practice of the law fails. For small businesspeople, this is the reality of being in business. Most small businesspeople write off any losses and move on.

The outcome, however, is a badly functioning economy. Where the law fails to provide cheap and efficient enforcement of commercial contracts, levels of commercial trust diminish. People engage in less business. The full wealth creation potential of the nation goes unrealised.

Of Australia's workforce of 11.5 million people, 2.1 million are self-employed small businesspeople. Of those, 1.1 million don't employ anyone. The other million employ about six million. That is, about eight million people run or work in the small business sector. It is the dominant sector of the economy, but it suffers systemic and institutionalised contractual dysfunction. This is a major economic issue.

The problem is being recognised. Policymakers understand that small businesspeople are like consumers in this respect. This realisation was reflected in intentions in 2010 to provide to small businesspeople the same unfair contract protections delivered to consumers under the Australian Consumer Law Act. The proposal had cross-party political support. but the federal ALP government buckled to big business lobbying and effectively screwed over small businesspeople by withdrawing the provisions.

It's not a dead proposition, however, because the Abbott opposition has a commitment to proceed with small business unfair contract protections should it win office.

Enter the state small business commissioners into the mix. The first small business commissioner position was created in Victoria in 2004, primarily providing a highly successful, cheap and quick dispute mediation process. The intent has been to help resolve disputes while keeping parties in business together where possible.

The model has attracted significant interest. During the past 12 months Western Australia, South Australia and NSW have appointed small business commissioners, all with dispute mediation powers.

What's new is that the mediation powers are being given more grunt. There's no intention to turn the commissioners into dispute courts with powers to enforce settlement. Rather, there are new powers to encourage participation by big organisations in dispute mediation. This started in South Australia, where the commissioner can require a party to present information to the mediator.

Proposals have recently been released in NSW that will take this further. If passed, the NSW Small Business Commissioner will be able to require parties to present information and answer questions. If mediation fails the commissioner can support a small businessperson in a legal action against a larger party or initiate legal action on behalf of the small businessperson.

Suddenly the mediation process becomes something hard to ignore by big business. The power imbalance that exists in practice between big and small business is somewhat evened out by the small business commissioner. It's a step forward.

Importantly, the NSW proposal does not take away the right of parties to litigate. Further, nothing done or said in the mediation can be used in court proceedings. The slate is clean. This enables a safer engagement process in mediation. As in Victoria, the intent is to push the focus towards commercial common sense rather than legal form or technicality. What this does is give some measure of practical application to the theory of contract law.

The evolving of the small business commissioner model across the states, particularly the proposals in NSW, is a game-changer for small businesses.

Some in big business and the government sector perhaps will howl that this is the end of commerce as we know it. It's not. It's the sensible advancement of business capacity.

The rule of commercial contract law needs to be a practical and affordable reality if business and the economy is to move forward. What's happening with the small business commissioners is a positive move in this direction.

Ken Phillips is executive director of Independent Contractors Australia and author of Independence and the Death of Employment

www.contractworld.com.au