



LEADR Response
to The Treasury
*The Small Business and Family
Enterprise Ombudsman
Discussion Paper
May 2014*

Contents

Introduction	3
Preamble	3
About LEADR	3
Contact details	3
Aims of the proposed service	4
Authority and name of the proposed service	6
Concierge for dispute resolution	7
Commonwealth-wide advocate	16
Conclusion.....	17

Introduction

Preamble

LEADR is very pleased to respond to *The Small Business and Family Enterprise Ombudsman Discussion Paper* published by The Treasury in April 2014. Our comments relate to Chapters 1, 2 and to a lesser extent Chapter 3. We also comment on other aspects of the *Discussion Paper* relevant to LEADR's knowledge and expertise.

LEADR consents to the publication of this *Response*. LEADR appreciates the opportunity we have had so far to meet with Treasury representatives to discuss the matters raised in the *Discussion Paper*. LEADR would be pleased to be involved in further consultations if this would assist Treasury in developing services described in the *Discussion Paper*.

About LEADR

LEADR currently has more than 2600 members spread across all states and territories of Australia, across New Zealand and in many countries in the Asia-Pacific region, including Indonesia, Malaysia, India, Tonga, Samoa and Micronesia. LEADR members are engaged primarily in mediation and increasingly they practise other ADR processes such as adjudication, arbitration, facilitation, conciliation and conflict coaching. Members are drawn from a wide range of professional backgrounds including law, psychology, human resources, social work, education, finance, accounting, management/business, architecture and engineering.

On a day-to-day basis LEADR:

- delivers training both as public workshops and in-house programs in mediation and associated dispute resolution topics
- accredits mediators under the LEADR Scheme for Accreditation and under the National Mediator Accreditation System (NMAS). LEADR has almost 900 nationally accredited mediators
- provides services to LEADR members including news and information, continuing professional development and collegiate networking
- responds to client requests with referrals of suitably qualified dispute resolution practitioners
- responds to inquiries from across the community about ADR
- promotes the practice of ADR in a wide range of settings including for government, business, industry and individuals in commercial, industrial, workplace, community and family matters

Contact details

Fiona Hollier | Chief Executive Officer | LEADR
Level 1, 13 -15 Bridge St | SYDNEY 2000 | 02 9251 3366 | fionahollier@leadr.com.au

Aims of the proposed service

LEADR reads in the *Discussion Paper* that:

“The Government has committed to transform the Australian Small Business Commissioner into a Small Business and Family Dispute Resolution Ombudsman (the Ombudsman) to be a:

- concierge 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”*

Chapter 1

Again in the *Discussion Paper*, LEADR reads that the Ombudsman service will contribute to removing roadblocks to small business by helping small business resolve disputes early and also by improving engagement with government.

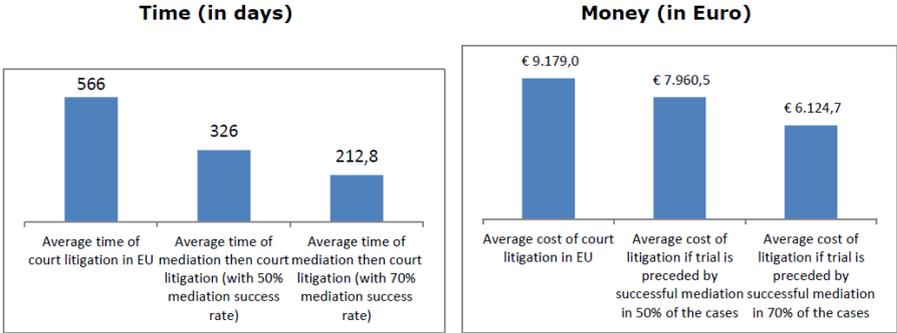
LEADR’s experience suggests that providing a voice for small business and family enterprise is important and we have been impressed by the diligence of and progress that has been made by the current Australian Small Business Commissioner. LEADR is also aware that disputes may present a significant drain on small businesses. Small businesses often do not have access to specialist internal or external services to assist them in addressing a dispute, nor can they corral time from other business activities to attend effectively to a dispute.

LEADR refers the Commission to the charts on the following page (p 9) included in the recently published report for the European Parliament prepared by Prof Giuseppe De Palo et al.¹ These charts support the value of mediation as they show that less time and money is expended even in cases where mediation is followed by litigation, than when litigation alone is used.

Therefore LEADR supports the aims of the service.

¹ European Parliament: Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs: Legal Affairs *‘Rebooting’ the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU* January 2014 p 9

Figure C: Comparing the Average Time and Money Savings of Litigation Only versus Mediation then Litigation (at different mediation success rates)



Authority and name of the proposed service

The *Discussion Paper* states that

“the Ombudsman will extend on the activities of the Australian Small Business Commissioner to create a more purposeful, empowered and effective role.” Chapter 1

As well, it will have statutory backing and legislative powers.

The name proposed for this service is the “Small Business and Family Enterprise Ombudsman”. LEADR infers that one of the reasons for naming the service an “ombudsman” is to distinguish it from the current Australian Small Business Commissioner and to signal its increased powers.

LEADR understands an ombudsman to be an independent office which primarily provides complaint handling and investigation services and does not provide any advocacy, regulatory or disciplinary functions. This aligns with the six essential criteria of an ombudsman service identified by the Australian and New Zealand Ombudsman Association (ANZOA) and included in the *Discussion Paper*.

One of the potential functions of the Small Business and Family Enterprise Ombudsman is as an advocate for small business. An advocacy role is inconsistent with the ANZOA criteria of independence required of an ombudsman. LEADR believes that using the title of ‘ombudsman’ for an agency with the proposed functions of the *Small Business and Family Enterprise Ombudsman* could lead to confusion for the particular groups for which it is being established to serve and for the wider community.

To this end, LEADR believes a more appropriate name would contribute to greater clarity for agencies, businesses and consumers alike.

LEADR considers that the real distinction between the existing Commissioner role and the proposed small business role will be the statutory backing and legislative powers for the new service.

LEADR suggests that “Australian Small Business and Family Enterprise Commissioner” would be an appropriate name. The role could be given statutory backing as is the case for the state small business commissioners. Naming it in this way would provide continuity with the established role of the current Australian Small Business Commissioner and parallel state Commissioner roles. The existing Commissioner role already includes information provision, small business assistance, advocacy and referral to dispute resolution. The proposed role as stated in the *Discussion Paper* expands rather than departs from this role.

Appropriate publicity about the expanded powers of the Commissioner would signal a change just as well as a change of name and avoids the need to educate that the “Commissioner” has been replaced by an “Ombudsman”.

Concierge for dispute resolution

Responding to complaints

The *Discussion Paper* appropriately distinguishes between complaints and disputes. In addition, the *Discussion Paper* emphasises that the proposed small business role:

“...should be complementary to and avoid overlap with the roles of other ombudsmen, the state small business commissioners and the services provided by state and territory governments where there are no small business commissioners.” Chapter 1

The recently published Productivity Commission *Draft Report* reports that 73 ombudsman services currently already annually address 773,000 complaints 267,000 of which are at the commonwealth level. The *Draft Report* also comments on the overall effectiveness of ombudsman, recommending that they be better publicised and that where appropriate they be rationalised. LEADR supports these draft recommendations.

LEADR thinks that including an ombudsman function within the proposed small business role would overlap with current and potentially future rationalised ombudsman services. As well, as already noted, because of its advocacy function, the proposed small business role could not be as effective in delivering this function as are dedicated ombudsmen services.

LEADR referred to the ANZOA website which includes this information:

“Ombudsman’ is a particular model of alternative dispute resolution ...

Ombudsmen use a range of methods to resolve complaints. These include negotiation, conciliation, investigation, providing opinions and recommendations, and (in the case of industry-based Ombudsmen) making decisions that bind service providers.”

This model means that cooperative interest based dispute resolution processes and determinative rights based processes are included in the ombudsmen’s methods. It is challenging to associate these methods within one service. Existing ombudsman services are able to do this as it is their core business and they train their staff to deliver their “*particular model of ADR.*” LEADR wonders to what extent the proposed small business role with its diverse functions could effectively deliver the particular model of ADR associated with an ombudsman.

The proposed small business role could take inquiries about complaints and through the “preliminary inquiries approach” described below could assist small businesses to decide on next steps including where appropriate to choose the appropriate mechanism for having their complaints addressed.

Resolving disputes

The *Discussion Paper* suggests that the proposed small business role will develop its own mediation service. LEADR thinks that such a service would overlap with existing services.

In 2011 LEADR conducted a survey of its members about which model they preferred of those proposed in the Department of Innovation, Industry, Science and Research, *Options Paper for Resolution of Small Business Disputes*. Of the 140 responses:

*25% favoured the national information referral service and
41% favoured the national dispute resolution service*

Respondents' commentary reveals that most considered that both a national information referral service and a national dispute resolution service would primarily be a referral and coordinating service only offering direct services to fill a gap.

Consistent with the responses from our members and with our current thinking, LEADR believes that the "mediation service" of the proposed small business role should build on the successful model of the current Australian Small Business Commissioner. The *Discussion Paper* states:

The Australian Small Business Commissioner does not provide a formal dispute resolution service to businesses. If a business raises a matter with the Office of the Australian Small Business Commissioner, the Office provides a 'triage' service by undertaking preliminary discussions and enquiries to determine the most appropriate course of action. This can involve: referring the business to existing alternative dispute resolution mechanisms; referring the business to other government agencies or services; or conducting preliminary enquiries that focus parties on the real issues.

To date, mirroring the experiences of the state small business commissioners, the majority of disputes or issues raised with the Australian Small Business Commissioner (84 per cent) have been resolved through conducting preliminary enquiries. Chapter 2

LEADR adds that matters should only be referred to existing alternative dispute resolution mechanisms which ensure that their practitioners are appropriately accredited. Specifically:

- When referring to mediation or conciliation, the proposed small business role be required to refer to practitioners with current accreditation under the National Mediator Accreditation System (NMAS)². This is colloquially referred to as national accreditation. (In relation to conciliation, a separate voluntary standard may emerge, as there is currently industry discussion about developing such a standard for conciliators to acknowledge the specific competencies that are different from those required by mediators.)
- When referring to other ADR services, the proposed small business role be required to use practitioners accredited by a reputable ADR organisation.

² *The National Mediator Accreditation System: Approval Standards and Practice Standards 2007 amended 2012* <http://www.msb.org.au/mediator-standards/standards>

Apart from the potential overlap with existing services, LEADR notes that it would be challenging and costly for the proposed small business role, if operating its own mediation service, to ensure that it only uses currently accredited practitioners. Accreditation systems such as the NMAS, which is overseen by the Mediator Standards Board³, require practitioners:

- to complete initial training which complies with the *NMAS Approval Standards*
- to undertake to comply with the *NMAS Practice Standards* which include ethical behavior guidelines
- to comply with ongoing practice and continuing professional development requirements to retain accreditation
- to hold professional indemnity insurance and provide access to a complaints mechanism

Accrediting bodies (known as Recognised Mediator Accreditation Bodies in the NMAS) monitor that practitioners are meeting these requirements, and in cases where practitioners do not meet the requirements, their accreditations lapse. A mediation service with its own panel of practitioners would need to institute monitoring processes to ensure the currency of practitioners' accreditations.

LEADR believes that the proposed small business role could provide or arrange to be provided, in-service training for nationally accredited mediators regarding small-business disputes with Australian government agencies and disputes under industry codes of conduct. Having said this, LEADR notes that the expertise of a mediator is the mediation process. Participants in the mediations are and remain experts in the content throughout the mediation. A mediator is therefore a generalist with regard to content and a specialist with regard to process. Many mediators with experience in commercial, workplace, family or other areas would be well able to conduct mediations in the small business area.

Disputes with Australian Government agencies

The *Discussion Paper* states that:

There is currently no formal, overarching dispute resolution mechanism for small businesses in disputes regarding their commercial relationships with Australian Government agencies.
Chapter 2

LEADR believes that small business disputes with government agencies would be largely addressed if those agencies developed dispute resolution management plans at all levels of government.

³ The Mediator Standards Board <http://www.msb.org.au/about-us/msb-role>

LEADR notes that the *Legal Services Directions 2005* (including the 2008 amendments) prescribes use of ADR wherever possible as part of commonwealth agencies' obligations to be model litigants. LEADR would prefer that these obligations required agencies to be "model dispute resolvers" rather than model litigants. This would emphasise the expectation that agencies should aim to resolve disputes as early and as quickly as possible, using litigation as a final rather than first resort. LEADR also notes that NADRAC published in 2010 *Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan NADRAC 2010* and the accompanying *A Toolkit for developing Dispute Management Plans*.

The Productivity Commission *Draft Report* records that only a small number of commonwealth government agencies have developed plans that enable them to fulfil these obligations comprehensively. The *Draft Report* recommends that

"...the development of these plans be accelerated and that progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015."
Draft recommendation 8.2

If needed, government agencies could access assistance to develop such plans as many ADR practitioners have expertise in dispute system design. LEADR suggests that such plans should include whole of agency commitment and strategies:

- to prevent disputes
- to develop high standards of ADR practice
- to use ADR before commencing legal proceedings and then if litigation is commenced, to continue to explore, support and facilitate the use of ADR at all stages in the dispute
- to improve dispute resolution practices by those involved in litigation and legal services (which will require education about and training in ADR)

As well, such plans could include a commitment to interact in ways that respect difference and put into practice the National ADR Principles developed by NADRAC.

With such plans in place, agencies and small business would be able to access existing dispute resolution mechanisms. The proposed small business role could assist by providing the triage role identified above, by providing information about the existence of dispute management plans and how to approach government departments about disputes or how to submit a complaint to an existing ombudsman. As an advocate for small business, the proposed small business role could contribute to developing these plans so that the needs of small business are considered.

International business disputes

LEADR does not believe that it is the role of a statutory agency to engage in resolving international disputes concerning small businesses. Once again this would overlap with existing mechanisms such as the *Australian International Disputes Centre* and the many private ADR practitioners operating in this arena. The

proposed small business role again could provide a very helpful information service about how to access dispute resolution in such cases and also assist small businesses to develop robust processes and practices to help prevent disputes occurring. The role could also advocate on behalf of small businesses to existing mechanisms to encourage those mechanisms to be responsive to the needs of small business. With statutory backing and the ability to contribute to developing legislation, the proposed small business role could contribute to developing the frameworks and conditions which would help small businesses to engage internationally.

Interstate business disputes

The *Discussion Paper* states that:

National uniformity in relation to small businesses engaged in interstate business disputes is also desirable — to avoid different outcomes in different jurisdictions on similar issues.

Chapter 2

LEADR is keen to clarify “different outcomes”. A feature of ADR processes is that outcomes are specific to the interests of those engaged in the dispute. In cooperative processes such as mediation, the participants themselves identify the issues, explore their interests and generate a range of options with the goal of reaching an outcome which best addresses those interests. That is, participants create their own norms for future behaviour, within the legal parameters relevant to the circumstances.

National uniformity of outcomes is therefore not desirable nor realistic if practical, durable outcomes are sought.

LEADR suggests that a more appropriate goal is national uniformity in approach to resolving disputes for small businesses engaged in interstate business disputes. The proposed small business role could play an instrumental role in encouraging improvements to existing services, by developing best practice benchmarks and by instigating and chairing discussions about policy, monitoring of services and data collection and reporting. The role could support the development of memorandums of agreement between different state agencies that would assist in developing a uniform national approach.

LEADR believes that the proposed small business role should not be directly involved in resolving these disputes for the reasons outlined above. Instead, it should focus on “triage” which aims at providing comprehensive information that enables participants to choose the appropriate processes for themselves. (ADR practitioners can assess for suitability in relation to the particular process chosen). The small business role should also include referral to existing dispute resolution mechanisms, advocacy, education and information provision.

Industry codes

LEADR is aware of anecdotal reports that small business finds that the current industry code framework can be both demanding and complex. LEADR has consistently heard of industry codes favouring the organisation to the disadvantage of the small business proprietor.

Small businesses may be subject to more than one code with differing requirements which can be confusing and represent a significant drain on their resources. Small businesses frequently object to overlap of commonwealth, state and local services. Small business values simplicity and cost effectiveness.

LEADR encourages review of the industry codes for the purposes of rationalisation and of creating a uniform approach to the processes of dispute resolution. LEADR thinks that the proposed small business role could be the central point of information for such all codes. Again, LEADR believes that the proposed small business role should not be directly involved in resolving code disputes for the reasons outlined above. Instead, it should focus on referral to existing dispute resolution mechanisms, advocacy, education and information provision.

Determinations made by the Ombudsman

In line with our commentary earlier, LEADR believes that the proposed small business role should not include an ombudsman function. The ombudsman function should be delivered by a dedicated ombudsman service. This will enable the proposed small business role to fulfil important advocacy functions and will contribute to clarity of organisational functions within both government and the community.

LEADR notes that the *Discussion Paper* confuses mediation outcomes with determinations. The *Discussion Paper* states that:

Where the Ombudsman attempts to resolve a dispute through its own mediation service, there are a number of possible powers which could affect how the Ombudsman's determinations are treated ...

Chapter 2

Mediation does not provide determinations. The National Mediator Accreditation System defines mediation as a:

"...process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decision".

The Australian National Mediator Standards: Approval Standards September 2007

LEADR believes that confusion in terms is apt to arise when services which reflect very different approaches are brought together. This further strengthens LEADR's suggestion that the proposed small business role does not include an ombudsman function.

The *Discussion Paper* states as an option that:

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.

Chapter 2

LEADR believes that the proposed small business role could contribute to the development of pre-action protocols that require people in dispute to attempt dispute resolution before filing to commence legal proceedings. LEADR considers that Family Law has paved the way for targeted pre-action protocols throughout the justice system. LEADR further considers that disputes have more in common than to distinguish among them. The substantive aspects of a dispute, while used to characterise the dispute, can risk exaggerating the differences and minimising the similarities among disputes and appropriate processes for resolving them. LEADR therefore considers that the dispute resolution approach of the Family Law System is a suitable starting point for all disputes. In this system, Family Dispute Resolution Practitioners in either Family Resolution Centres or in private practice, provide certificates when appropriate. An ombudsman service is not required to centralise the issuing of certificates or make their implementation practicable.

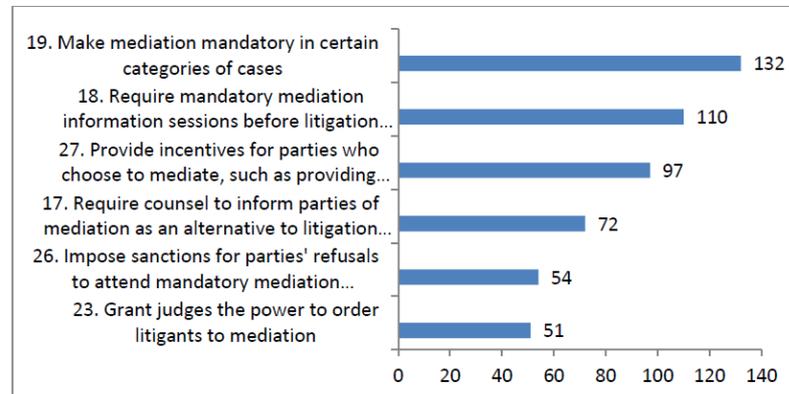
To help make the case for a mandatory referral system, LEADR refers The Treasury to a recent report from The European Parliament⁴ which states that it is only some degree of compulsion to mediate which increases the number of mediations as summarised in the following extract and in the charts (p10) below.

“A thorough comparative analysis of the legal frameworks of the 28 Member States, combined with an assessment of the current effects of the Mediation Directive in terms of its produced results throughout the EU, shows that only a certain degree of compulsion to mediate (currently allowed but not required by the EU law) can generate a significant number of mediations (Figure D).⁵ In fact, all of the other pro-mediation regulatory features mentioned in the study’s terms of reference, such as strong confidentiality protection, frequent invitations by judges to mediate and a solid mediator accreditation system, have not generated any major effect on the occurrence of mediations. Compelling evidence of this comes by comparing the number of mediations in Member States where one or more of these features are present and, even more so, have been present for a long time.”

p 9

⁴ European Parliament op cit. p 9 -10

Figure D: Top-Ranked, Most Effective Legislative Measure to Increase Mediation Use (by number of preferences expressed)



The European Parliament Report also reports that mandatory mediation increases voluntary mediation. This conclusion draws particularly on the experience in Italy where there have been periods of mandatory (or mitigated mandatory) and non-mandatory mediation.

Delivery of dispute resolution services

The *Discussion Paper* states that:

The Ombudsman could deliver dispute resolution services through an outsourcing model, in-house, or a combination of both. All models would be constrained by the finite number of accredited mediators in the marketplace.
Chapter 2

LEADR's commentary throughout this *Response* favours an outsourcing model. The comment above suggests that a constraint will be the "finite numbers of accredited mediators". There are close to 2000 mediators accredited under NMAS a large number of whom are keen for additional mediation work. Feedback from LEADR's members and those who complete our mediation training courses, is that more people want to work as mediators than can currently find opportunities to do so. In summary, LEADR believes that dispute resolution services will not be constrained by lack of mediators. Supply currently well exceeds demand.

LEADR favours an out-sourced model because:

- Commonwealth government providing dispute resolution services directly is an expensive approach which is necessarily sensitive to changing government policy and budget priorities
- Effective referral, awareness raising and education will contribute to better use of existing services. Repeatedly members commented in the LEADR 2011 survey that there are already many services which small business is not aware of and does not know how to access.
- Use of accredited ADR practitioners is essential, as accreditation guarantees a level of training and/or experience, ongoing practice and continuing professional development requirements and recourse to a complaints

mechanism. Tracking currency of practitioners' accreditation is already undertaken by accrediting bodies and represents an unnecessary administrative and cost burden for a government service

- Existing mechanisms will generally provide a prompt and responsive service
- External services help to maintain the independence and impartiality of practitioners. Anecdotal reports suggest that practitioners in internal mediation services tend to become more advisory as their subject knowledge becomes very specialised. As well, practitioners in external services tend to stay connected to the wider mediation industry.
- External services reinforce the ADR principle of parties retaining responsibility for the content of their dispute and ADR practitioners taking responsibility for the process.

To ensure an affordable service, it may be possible for the proposed small business role to offer financial support to small businesses that meet given criteria to indicate financial need. This could be managed through direct payments to business owners in need, or to dispute resolution providers. Consideration could also be given to developing a low cost model of mediation (e.g. a restricted number of hours) for businesses that meet the financial need criteria. Legal Aid in Western Australia and in other states has developed a brief mediation model.

Commonwealth-wide advocate

LEADR supports the proposed small business role having a Commonwealth advocacy role.

The *Discussion Paper* suggests that legislated powers to obtain information and investigate complaints is a key component of the advocacy role.

LEADR thinks investigating market practices and analysing trends in numbers and types of complaints and disputes and the manner in which they are resolved is consistent with the proposed small business role. LEADR reiterates that investigating and determining the outcomes for particular complaints is best allocated to the role of a separate independent Ombudsman.

The *Discussion Paper* identifies a role for the proposed small business role as an industry advocate. This role is largely described in terms of developing best practice for bargaining and contracts, providing tips for family businesses, and offering information on specific business, management and operational practices. The *Discussion Paper* suggests that such measures would both provide valuable support for small business and alleviate the incidence of disputes.

LEADR supports the proposed small business role having an industry advocate role as described.

Conclusion

LEADR appreciates the opportunity to have commented on *The Small Business and Family Enterprise Ombudsman Discussion Paper Discussion Paper* prepared by The Treasury.

As can be seen in our comments, LEADR is supportive of the proposed small business role providing triage, referral to existing dispute resolution mechanisms, advocacy, education and information. LEADR favours the ombudsman role being kept separate to the proposed role and naming the role in such a way that helps provide clarity for small businesses and others in the community.

LEADR affirms its willingness to engage in discussions and to respond to future papers and proposals.