

## **SUBMISSION TO THE TREASURY REGARDING *THE SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN* DISCUSSION PAPER**

**29 MAY 2014**

News Corp Australia welcomes the opportunity to make a submission to The Treasury's *The Small Business and Family Enterprise Ombudsman* Discussion Paper (the Paper).

We concur with the Minister that access to justice and dispute-resolution services is important for business. However, we are concerned that there is a lack of clarity regarding the jurisdiction of the Small Business and Family Enterprise Ombudsman (SB&FEO), which increases the risk of jurisdictional overlap and duplication of the existing range of dispute resolution services.

It appears that with such a range of conflict and dispute resolution services available in the marketplace and via a range of national and state legislative and regulatory authorities and institutions – in addition to dispute resolution provisions being included in many commercial contracts – it is not entirely clear what the gap is that needs to be filled. It therefore follows that if the gap is not able to be clearly articulated, the introduction of additional services under a national framework could lead to sub-optimal outcomes including increased risk of forum shopping and misallocated resources for all parties. We believe that these risks must be mitigated for the SB&FEO to be efficient and effective in discharging its role.

This submission is structured such that our comments correspond to elements of the Paper.

### **COMPLAINTS VERSUS DISPUTES**

The Paper states that while the terminology of 'complaints' and 'disputes' may be used interchangeably, the role of the Small Business and Family Enterprise Ombudsman (the Ombudsman) will differ depending on whether a business is complaining about a particular practice or a dispute over a contract that needs mediation.

While we acknowledge the different roles an Ombudsman may take in the circumstances outlined, we caution that the circumstances may not be as delineated as outlined in the Paper, for example it may be that such circumstances are not necessarily different, but it may also be the case that they are.

Further, we note that the Paper outlines that a business may approach the Ombudsman as it is seeking to 'resolve a disagreement with another business' and that the Ombudsman may undertake preliminary enquiries into the matter before considering an appropriate method to resolve the dispute –including referral to alternative dispute resolution services. It may be prudent for the Ombudsman's initial engagement with the business to ascertain:

- Whether the 'disagreement' has been raised with the other party/s;
- The response of the other party/s;
- Any actions being undertaken – including meetings, communications, engagement – by the parties better understand and resolve the issue;

- Whether the contractual arrangements between the parties includes processes, including dispute notification and alternative dispute resolution (ADR), to assist in resolving the issue; and
- Whether either party – particularly the party approaching the Ombudsman – has formally notified a dispute and commenced processes, including ADR, under the terms of the contract.

This could form part of the decision making process, whereby the Ombudsman would decide the most appropriate next step for the parties – including whether, or not, that sits within the office of the Ombudsman, or another Commonwealth or State agency, authority or Commission; or taking action already provided for under the terms of the commercial contract.

Importantly, such initial inquiry and decision making would encourage the parties to work through the matter, and thereby encourage the most efficient and effective use of resources within the office of the Ombudsman.

It also seems prudent that where there are already dispute resolution services offered in the marketplace, that the SB&FEO should outsource dispute resolution to ensure the most efficient allocation of resources.

#### **EXISTING DISPUTE RESOLUTION SERVICES**

As the Paper notes, there is already a range of dispute resolution services offered to businesses within the frameworks of various state and territory legislative and regulatory frameworks, including those offered directly by the state small business commissions, civil and small claims tribunals, fair trading offices and the courts.<sup>1</sup> It is important to also note that there are also a range of conflict and alternative dispute resolution services offered by the market.

It appears that with such a range of conflict and dispute resolution services available, it is not entirely clear what the gap is that needs to be filled. It therefore follows that if the gap is not able to be clearly articulated, the introduction of additional services under a national framework could pose an increased risk of unnecessary duplication and replication of services and the consequences of an increased risk of forum shopping and misallocated resources.

#### **DEVELOPING THE OMBUDSMAN'S OWN MEDIATION SERVICE**

Given that the market already offers conflict and alternative dispute resolution services, provisions for which are often incorporated into commercial contracts, are also available directly and indirectly via various national and state and territory authorities, News Corp Australia concurs with the opinion expressed in the Paper that it is critical that the services offered by the SB&FEO avoid duplicating existing services.<sup>2</sup>

The Paper suggests that there may be four types of small business disputes that the SB&FEO's own dispute resolution service could focus on: disputes with Australian Government agencies; international business disputes; interstate business disputes; and disputes under industry codes of conduct.

Our comments focus on the concepts of interstate disputes and also disputes under industry codes of conduct.

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<sup>1</sup> *The Small Business and Family Enterprise Ombudsman*, Discussion Paper, p10 and 11

<sup>2</sup> *Ibid.*, p11

### *Interstate disputes*

The Paper notes that national uniformity is a desired outcome of dispute resolution in relation to small businesses engaged in interstate business disputes – to avoid different outcomes in different jurisdictions on similar issues.<sup>3</sup> We suggest that if the Government proceeds with such a course of action, that it does so with caution, and looking at each matter that is presented on a case-by-case basis.

In order to delineate jurisdiction for the national SB&FEO from those of various state entities, the Paper states that:

*‘Large corporations often have a presence in several jurisdictions, and so a dispute between a corporation and a small business in one jurisdiction could be relevant to small businesses in other jurisdictions.’<sup>4</sup>*

We are concerned about this reasoning because of the lack of certainty encompassed by the each element of the statement and also the interaction between each of the elements, including but not limited to:

- Large corporations could have a presence in several jurisdictions – and it is also the case that they have a presence in single, multiple or all jurisdictions;
- The ‘presence’ may operate under a range of contractual commercial arrangements including where other parties operate on their behalf;
- Each and every one of those commercial arrangements may be different, or not, and may or may not be bounded by jurisdictions and geographic boundaries;
- Just as there are differences between small businesses, including those that may appear to be similar due to a convenient nomenclature (for example, newsagents), large business is similarly not homogenous, other than via the convenience offered by nomenclature; and
- A simple illustrative example;
  - a dispute between a large enterprise and a small business regarding distribution terms and conditions, may – or may not – be relevant to similar small businesses in other jurisdictions; and
  - a dispute between a large enterprise and a small business regarding distribution terms and conditions, may – or may not – be relevant to different small businesses in other jurisdictions.

Given the non-exhaustive list above, it would be prudent that each and every matter raised would require a level of inquiry before ascertaining where and how the matter would best be directed for appropriate action, including resolution if required.

We believe that it is important to state that good policy making is based on sound principles including a well understood and evidenced problem/issue and an appropriate and proportionate response. This should also be the approach for ascertaining jurisdictions of institutions – what is the problem (or gap) in dispute resolution jurisdiction that needs to be addressed, and then respond to it appropriately and proportionately.

We therefore heed caution regarding the category of ‘interstate business disputes’ as outlined in the Paper. A framework for creating a jurisdiction which is based on a

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<sup>3</sup> Ibid. p12

<sup>4</sup> Ibid., p12

presumption that a set of commercial circumstances in one jurisdiction may be indicative of problems elsewhere seems contrary to sound evidence-based decision making, and would likely lead to regulatory over-reach, jurisdiction creep, increased risk of multiple disputes, forum shopping, and the inefficient allocation of resources for the entities involved and the SB&FEO.

## **POWERS TO SETTLE DISPUTES**

As referenced above, the Paper recognises that there already exists a range of dispute resolution services accessible to businesses within the frameworks of various state and territory legislative and regulatory frameworks, including those offered directly by the state small business commissions, civil and small claims tribunals, fair trading offices and the courts. Again, it appears that with such a range of conflict and dispute resolution services available, it is not entirely clear what the gap is that needs to be filled, nor therefore the powers that should be conferred to the Ombudsman to resolve the disputes that would arise within the SB&FEO's to-be-decided jurisdiction. Importantly, however, the jurisdiction of the SB&FEO should avoid overlapping jurisdictions and duplicating existing services as both could lead to forum shopping, and additional confusion and complexity.

It also seems incongruous that the national Ombudsman, and the office of the SB&FEO, could be providing in-house alternative dispute resolution services to businesses and also will be an advocate for small business.