



LEADR & IAMA Response to
The Treasury
*The Australian Small Business
and Family Enterprise
Ombudsman exposure draft
legislation*

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Introduction

Preamble

LEADR & IAMA is very pleased respond to The Australian and Small Business and Family Enterprise Ombudsman Bill (2015) (the Bill). In this Response LEADR & IAMA has focused primarily on the dispute resolution aspects proposed in the Small Business role. This submission should be read in conjunction with the LEADR Response of May 2014 to the Discussion Paper about establishing a small business and family enterprise ombudsman. The 2014 Response provides additional detail and covers more aspects of the proposed role.

LEADR & IAMA congratulates Treasury on considering the feedback on the Discussion Paper and preparing and releasing the Bill in less than a year since the last public consultation period.

LEADR & IAMA 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 Bill. LEADR & IAMA would be pleased to be involved in further consultations, especially in relation to establishing a panel of nationally accredited mediators, if this would assist Treasury in developing services described in the Bill.

About LEADR & IAMA

On 1 January 2015, LEADR & IAMA integrated to form the leading not-for-profit DR organisation in Australasia. LEADR has a vibrant membership of more than 3500 DR practitioners who provide services in all major and recognised forms of DR.

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. LEADR & IAMA is a temporary name. We anticipate launching a permanent name within the next few months.

On a day-to-day basis LEADR & IAMA:

- Delivers training both as public workshops and in-house programs in mediation and associated dispute resolution topics
- Accredits mediators under the National Mediator Accreditation System (NMAS). LEADR & IAMA has more than 1000 nationally accredited mediators
- Provides a robust grading scheme (Grades 1 - 3) for arbitrators. LEADR & IAMA has more than 500 graded arbitrators
- Delivers adjudication services in 7 state jurisdictions in Australia
- Ensures the quality of the adjudication service through adjudicator training and ongoing CPD and review of selected determinations.
- Provides services to LEADR & IAMA 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 DR
- Promotes the practice of DR 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 & IAMA

Level 1, 13 -15 Bridge St | SYDNEY 2000 | 02 9251 3366 | fhollier@leadriama.org

General comments

Proposed Small Business Role

As articulated in the LEADR 2014 Response, LEADR & IAMA acknowledges the need for many of the services proposed to be provided by the Ombudsman. In particular, LEADR & IAMA considers that there is a need for advocacy, inquiry and dispute resolution services.

As also articulated in the LEADR 2014 Response, LEADR & IAMA considers that it is inappropriate for these services to be combined into the single role of an Ombudsman.

In the LEADR 2014 Response, we stated that we understand 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.

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 criteria of independence required of an ombudsman.

LEADR & IAMA considers that the advocacy, inquiry, regulatory and disciplinary functions of the proposed Ombudsman should be retained by a Commissioner role and that the complaint handling and investigation services should be included as part of an existing Ombudsman service. LEADR & IAMA considers that including an Ombudsman function within the proposed small business role would overlap with current and potentially future rationalized ombudsman services.

The advantages of having complaints handling and investigation services delivered by a dedicated Ombudsman is that providing this mix of facilitative and determinative DR services is core business for Ombudsman so such a service is able to train its staff to deliver their “particular model of ADR.” LEADR & IAMA has concerns about the extent to which the proposed small business role with its diverse functions could effectively deliver the particular model of DR associated with an ombudsman.

The proposed small business role could incorporate an inquiries service about complaints and through preliminary inquiries could assist small businesses to decide on next steps including where appropriate to choose the appropriate mechanism for having complaints addressed.

Proposed name

LEADR & IAMA considers that using the title of ‘ombudsman’ for an agency with the proposed functions of the Australian 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, as stated in the LEADR 2014 Response, LEADR & IAMA believes that a more appropriate name would contribute to greater clarity for agencies, businesses and consumers alike.

LEADR & IAMA favours that the advocacy, inquiry, regulatory and disciplinary functions be captured under the title of “Australian Small Business and Family Enterprise Commissioner”. 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 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”.

LEADR & IAMA 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.

Qualifications of mediators

The Bill envisages the Ombudsman service as a concierge for dispute resolution. It also envisages the Ombudsman will be able to provide recommendations about how a dispute may be addressed. In some cases the Ombudsman will refer cases to other agencies or may provide a written recommendation about using a DR service. LEADR & IAMA considers that this will be a useful service, albeit as part of a service titled Commissioner. In practice, clients will choose their own mediators potentially from "a panel of specialist mediators" used by this small business service.

In the LEADR 2014 Response we identified the qualification that is appropriate. The qualification is known as national accreditation, which refers to accreditation under the National Mediator Accreditation System (NMAS). LEADR & IAMA considers that this qualification should be prescribed in the legislation, as it has been for the first time in the current Bill.

In the LEADR 2014 Response, we state 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. As well, we noted 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.

Accessing DR practitioners

It is not clear in the Bill the extent to which the Ombudsman will establish its own panel of mediators. In the LEADR 2014 Response, we suggested that the proposed Small Business role should avoid establishing its own panel of mediators as it is time consuming and therefore expensive to oversee the continuing accreditation of mediators. The National Mediator Accreditation System, which is under the auspices of the Mediator Standards Board, requires practitioners:

- to complete initial training which complies with the NMAS Approval Standards
- to undertake to comply with the NMAS Practice Standards which include ethical behaviour 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. If the proposed Small Business service established its own panel of practitioners, it would need to institute monitoring processes to ensure the currency of practitioners' accreditations. The proposed Small Business role could provide information to clients about a range of methods for accessing DR practitioners or it could establish a relationship with an organisation that would undertake to oversee the ongoing accreditation of practitioners and the completion of training in small business needs. LEADR & IAMA already maintains oversight of practitioners' accreditation and has experience in establishing specific purpose panels. LEADR & IAMA would be very pleased to explore further with you establishing a panel for small business disputes.

Conclusion

LEADR appreciates the opportunity to have commented on The Australian Small Business and Family Enterprise Ombudsman Discussion Bill.

As can be seen in our comments, LEADR & IAMA 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 & IAMA also encourages Treasury to take a leading role in mandating the use of mediators with national accreditation (NMAS).

LEADR affirms its willingness to engage in further consultation and to assist with the implementation of the dispute resolution service including the establishment of a suitably qualified panel of DR practitioners.