

25 July 2012

Office of the Small Business Commissioner,
Consultation Paper Legislative Review
GPO Box 5477
SYDNEY NSW 2001

By email: sbc.legislation@smallbusiness.nsw.gov.au

Dear Sir/Madam,

The New South Wales Business Chamber is pleased to respond to the *A Legislative framework for the NSW Small Business Commissioner* consultation paper. The establishment of a NSW Small Business Commissioner was a key plank of the NSWBC's 10 Big Ideas to Grow NSW campaign. It's appropriate to now formulate legislation to ensure that the Commissioner is able to carry out her role effectively.

The NSWBC is one of Australia's largest business support groups, helping around 30,000 businesses each year. Founded in 1885, the NSWBC works with thousands of businesses, from owner operators to large corporations, from product based manufactures to service provider enterprises. The Chamber is a leading business solution provider and lobbying group with strengths in workplace management, occupational health and safety, industrial relations, human resources, international trade and improving business performance.

Operating throughout a network in metropolitan and regional NSW, NSWBC represents the needs of business at a local, State and Federal level, advocating on behalf of its members to create a better environment for industry.

The NSWBC has already been working closely with the inaugural NSW Small Business Commissioner Yasmin King in identifying regulatory and administrative issues impacting on small businesses. The NSWBC is happy to respond to the issues raised in the consultation paper which seeks to detail these issues further.

1. What do you think about the proposals for the appointment and removal of the Commissioner?

The appointment and removal proposals for the Commissioner appear to be appropriate for a role of this type. The NSWBC supports the term of the Commissioner being five years which stretches beyond a single term of Government and as such will give greater independence to the position.

2. Are there any other mechanisms that should be put in place to strengthen the role of the Commissioner?

Legislative mechanisms to strengthen the Commissioner's role will be dealt with in more detail under 'proposed functions' in the discussion following.

The NSWBC notes however that the protections and immunities afforded the Legal Services Commissioner (under the *Legal Professional Act 2004*) are proposed to be extended to the

NSW Business Chamber incorporates

- Sydney Business Chamber
- Australian Business Limited Apprenticeships
- Australian Business Lawyers and Advisors
- Australian Business Consulting and Solution

NSW Business Chamber Limited
140 Arthur Street
North Sydney NSW 2060
ABN 63 000 014 504
Locked Bag 938
North Sydney NSW 2059
DX 10541 North Sydney
t 13 26 96
f 1300 655 277
e navigation@nswbusinesschamber.com.au

Regional Offices ACT, Mid North Coast, Western Sydney, Northern Rivers, Hunter, Murray/Riverina, Illawarra, Southern Sydney, Northern Sydney, Central Coast

Small Business Commissioner, the Commissioner's staff and mediators. These protections are vital to ensure that the Commissioner and staff can deal confidently with issues and are strongly supported by the NSWBC.

3. What functions do you think are appropriate for the Small Business Commissioner?

The NSWBC sees the Small Business Commissioner carrying out a broad range of functions and would support the adoption of all the roles identified within the consultation paper.

With that said, the NSWBC does note a potential conflict between the Commissioner's legislative and administrative review function and the review roles performed by the NSW Better Regulation Office and the Independent Pricing and Regulatory Tribunal. The NSWBC sees all these agencies having a role in reviewing the NSW regulatory environment and each should complement the other. It would be appropriate therefore for consequential amendments to be made to the *Independent Pricing and Regulatory Tribunal Act 1992* to ensure that the Small Business Commissioner's function in reviewing regulation is statutorily recognised by that Act. A Memorandum of Understanding or other such instrument should also be entered into with the Better Regulation Office to ensure that there is a formal basis for the sharing of information and resources between these two offices.

The NSWBC also notes that the 2012/13 NSW Budget Papers provided:

*\$11.5 million in 2012-13 for expansion of the Small Biz Connect program, the Small Business Commissioner and for a **regulatory flying squad to tackle red tape encountered by small business across the state** (emphasis added)*¹

It is the NSWBC's understanding that the Commissioner will lead the regulatory trouble shooters as they examine red tape impacting on individual businesses. While this function may not require statutory recognition, it is a significant administrative function and is acknowledged and strongly supported by the NSWBC.

4. Are there any other functions which have not been included above which you think are necessary?

With small business commissioners having now been established in Victoria, South Australia, Queensland, Western Australia and (soon) federally it would seem appropriate to provide the NSW Small Business Commissioner with a function to share and gain knowledge from her interstate counterparts. To build on the resources and work of her state counterparts, the NSWBC notes that the Commissioner has already held the inaugural national forum of Small Business Commissioners.

This consultation function could help to broaden the Commissioner's dispute mediation function by seeking that the Commissioner (in partnership with the NSW Cross Border Commissioner) look towards practical steps to overcome the many regulatory inconsistencies that occur at state borders. As was identified by the Small Business Commissioner during her initial listening tour, these regulatory anomalies impact significantly on small business operators in these areas.

5. Are there any mechanisms which have not been included above that you think are required by the Small Business Commissioner?

Broadly speaking, the mechanisms identified within the consultation paper are appropriate for the Commissioner to carry out her functions. The ability of the Commissioner to compel persons to provide

¹ See *NSW Budget Papers 2012-13*, Budget Estimates, Budget paper 3, pp 8-7

information or answer questions within a defined timeframe are necessary to ensure that matters can be dealt with quickly and effectively.

In addition to the point made above, the NSWBC notes the announcement by the NSW Attorney General, the Hon. Greg Smith SC of 23 August 2011 regarding the Government's postponement of the introduction of laws that would require parties to take reasonable steps to resolve disputes prior to the commencement of court proceedings². This, the NSWBC understands, relates to the operation of Part 2A of the *Civil Procedure Act 2005* which requires parties to take reasonable steps to resolve their dispute by mutual agreement or more narrowly define the issues in dispute prior to starting court action.

The Attorney General has now postponed the introduction of this Part of the Civil Procedure Act for 18 months to monitor similar provisions introduced into the Federal court system to ensure that those changes lead to the reduction and not add to the costs of litigation.

The NSWBC views the Part 2A reforms as a significant tool for the Small Business Commissioner to help bring parties together in alternative dispute resolution. NSWBC would strongly support the Commissioner reviewing the legislation to see whether consequential amendments are required to be made to Small Business Commissioner Act once Part 2A of the Civil Procedure Act commences operation.

As identified in the consultation paper, the NSWBC strongly supports the development of a "super complaint" mechanism to allow the Commissioner to investigate matters that are impacting on a collective group of small businesses. Far too often, single complaints in relation to a government agency or business are not seriously investigated. Providing the Commissioner with the ability to recognise and investigate complaints in the aggregate will allow these issues to be dealt with more thoroughly.

6. Are there any mechanisms that you think are not appropriate for the Commissioner to hold?

While the NSWBC recognises that under the South Australian small business commissioner model, the commissioner in that state has been provided with the ability to develop and administer an industry code to regulate the relationship between businesses in a specific industry, it does not see this as an appropriate tool for the discharging of the Commissioner's role in NSW.

Primarily, the NSW Small Business Commissioner should be recognised as an advocate for small business, helping to facilitate small business operations and ensuring that regulatory impacts are minimised. Granting the Commissioner a regulation making function would only serve to detract from her role as an advocate and is not supported by the NSWBC at this stage.

Furthermore, given that the *Competition and Consumer Act 2010* (Cth) already gives the Australian Competition and Consumer Commission (ACCC) the power to create and implement an industry code, in the interests of reducing confusion, duplication and maintaining regulatory consistency, state governments should not be seeking to allow a state agency or commissioner to power to create industry codes.

7. Should the Commissioner be able to refer to the Director General of NSW Finance and Services a finding that a party has exhibited persistent uncompetitive behaviour which contravenes any relevant law and which negatively impacts on small businesses, so that the Director General may consider that information in future procurement processes and/or the continued eligibility of that supplier to remain on panel contracts or government pre-qualification schemes?

In principle, the NSWBC would support such a provision being included in the Act as an appropriate deterrent to those businesses that persistently behave in an uncompetitive manner. There would however

²See:

[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/230811_litigation_reforms.pdf/\\$file/230811_litigation_reforms.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/230811_litigation_reforms.pdf/$file/230811_litigation_reforms.pdf)

need to be appropriate safeguards and appeal processes put in place to allow a business that has (following an adverse finding) changed its practices to be reconsidered for panel contracts or pre-qualification schemes. In light of these concerns, the NSWBC would appreciate further consultation on this provision once the Small Business Commissioner legislation is in draft form.

8. What incentives could be used by the Small Business Commissioner to encourage private sector businesses to participate in mediation or alternative dispute resolution with small business?

The clearest and most effective way for the Commissioner to encourage businesses to participate in mediation is by regularly communicating with the sector on the outcomes that her involvement in a dispute achieved. The NSWBC would be happy to assist in the dissemination of any communication materials that the Commissioner wishes to produce to ensure that the message is heard by the widest industry audience possible.

9. What incentives could be used by the Small Business Commissioner to encourage government bodies to participate in mediation or alternative dispute resolution with small business?

Like the response to question 8 above, there is a need for the Commissioner to undertake regular briefings with heads of Government and their agencies to alert them to the outcomes of her involvement in disputes. This is similar to the regular reporting of the NSW Ombudsman and the Independent Commission against Corruption on the outcomes of their investigations and will help promote cultural change across government organisations. The “naming and shaming” of Government agencies that refuse to involve themselves in the mediation process would be another way in which involvement could be encouraged.

10. What confidentiality provisions should be put in place to ensure that the commercial and other interests of parties to a dispute are adequately protected?

The NSWBC supports strong confidentiality provisions being included in the Small Business Act. Without such provisions, businesses will be hesitant to enter into dispute resolution for fear of commercially sensitive information being released.

Accordingly, the NSWBC supports any information provided to the Commissioner in carrying out the office’s functions being specifically excluded from the provisions of the *Government Information (Public Access) Act 2009*. Furthermore, the Commissioner should only be able to use information in a way that does not identify parties to a dispute.

11. Should any information disclosed by a party to the Office of the Small Business Commissioner be protected from being accessed by any party without the consent of the party from which the information was obtained?

With commercially sensitive material likely to be shared with the Commissioner in the discharge of her functions, it’s essential that mechanisms are put in place to ensure that **any** information provided to the Office of the Small Business Commissioner can only be accessed by a third party with the consent of the person from whom the information was originally obtained.

This requirement may need a legislative and administrative framework to minimise the risk of inadvertently releasing commercially sensitive information.

Further comments

Outside of the creation of new legislation, the NSWBC would be strongly supportive of an administrative requirement being placed on all cabinet proposals to include a small business impact statement. The inclusion of such a statement would allow for the Government to clearly identify the impact that new

regulations or initiatives would have on the small business sector and to consider these impacts fully in cabinet deliberations. Such statements would need to evidence a substantial effort in determining a proposal's impact and also through investigation by meeting with and engaging affected businesses and also discussing impacts with peak bodies such as the NSWBC. The Small Business Commissioner would play a key role in preparing such statements.

Please contact Luke Aitken of the NSW Business Chamber's Policy unit via email at luke.aitken@nswbc.com.au or on phone 9458 7582 should you have any queries about this submission.

Yours sincerely

A handwritten signature in black ink that reads "Paul Orton". The signature is written in a cursive, slightly slanted style.

Paul Orton
Director, Policy & Advocacy

