



A legislative framework for the NSW Small Business Commissioner

Consultation Paper

June 2012

CONTACT DETAILS

Phone: 1300 795 534

Fax: (02) 8222 4816

Email: sbc.legislation@smallbusiness.nsw.gov.au

Post: Office of the Small Business Commissioner, GPO Box 5477, Sydney NSW 2001

Web: www.smallbusiness.nsw.gov.au

Foreword by the Minister for Small Business

The NSW Government is committed to supporting small businesses.

Since coming to office, the NSW Government has worked hard to deliver on its commitments for our State's small businesses.

The NSW Government has:

- appointed a Small Business Commissioner to stand up for the rights of small businesses;
- announced Small Biz Connect, a new small business advisory service to provide small businesses face-to-face assistance from small business experts at a grass roots level;
- introduced a 30 day payment policy which requires government agencies to pay small businesses within 30 days, or small businesses receive interest on the amount outstanding; and
- put in place a 'one on two off' policy, as part of our commitment to reduce red tape.

As the Minister for Small Business, I'm pleased that for the first time in NSW, small businesses have an independent advocate. The State's inaugural Small Business Commissioner has already delivered some impressive wins for small businesses which have been subject to unfair practices by other businesses and Government agencies.

To implement the NSW Government's commitment of establishing the Small Business Commissioner as an independent officer, this consultation paper is seeking the public's comments on the role and functions of the Small Business Commissioner.

The purpose of this public consultation process is to ensure the Small Business Commissioner legislation reflects best practice and meets the needs of our small businesses.

The Commissioner is your advocate, and this is your chance to ensure the Commissioner has the appropriate powers and responsibilities to assist you when you need someone to speak on your behalf.

I strongly encourage you to be part of this opportunity and make sure your voice is heard.



Katrina Hodgkinson
Minister for Small Business

How can I make submissions and comments?

Comments on the options outlined in this Consultation Paper are welcome from all people interested in the NSW Small Business Commissioner legislation, particularly small business operators.

The Consultation Paper includes a number of questions at the end of each section which you are welcome to answer. You may choose to address all of the sections or to address only those sections that are most relevant to you. We also invite you complete the online survey at www.smallbusiness.nsw.gov.au and welcome any other suggestions you wish to make.

The Commissioner will be travelling across NSW on a Listening Tour throughout the months of June and July to discuss the proposal for the legislative framework and to hear the views of small business operators and other stakeholders. Up to date information on Listening Tour events will be available at www.smallbusiness.nsw.gov.au.

The closing date for submissions is **5.00pm, Friday 27 July 2012**. Please provide your submissions, comments, or completed survey by any of the following methods:

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Introduction

Small businesses are the backbone of Australia's economy, representing 96 per cent of all businesses. An estimated 2 million small businesses across the nation provide nearly half of all employment. In NSW alone, there are 650,000 small businesses which provide employment for around 50 per cent of the NSW workforce.

In addition to contributing to the economy directly, the small business sector is a crucial platform which underpins the efficient operation of many medium-sized and large businesses.

The inaugural NSW Small Business Commissioner, Ms Yasmin King, was appointed by the NSW Government in mid 2011 to support small businesses throughout the State.

The role of the Commissioner is to support small businesses by:

- providing low-cost dispute resolution services
- advising Government how best to provide assistance to small businesses
- identifying ways in which Government can create a climate in which the small business sector can flourish.

One of the Commissioner's first actions was to embark on a month long 'Listening Tour' throughout regional and metropolitan NSW in October and November 2011. With the support of the NSW Business Chamber, the Commissioner visited 28 locations to hear directly about the concerns, challenges, and rewards of being a small business operator.

The Commissioner met with a total of 533 small business operators in numerous locations across the State including metropolitan Sydney, the Northern Rivers, Mid North Coast, Murray Riverina, Central West, Central Coast, and the Hunter. While each area faces its own unique challenges, many of the issues voiced by small business operators are shared across NSW.

Overwhelmingly, many small business operators reported that the following needs of small business were not being adequately addressed by existing services:

- practical advice to meet the needs of the small business sector
- making it easier for small business to do business with Government
- assisting businesses to manage the burden of compliance
- addressing unfair market practices which negatively impact on business.

The role of the Small Business Commissioner was established by the NSW Government in recognition of the fact that small businesses are an integral part of the economy, yet their needs are not being adequately met. It is recognised that there are a number of government bodies that already provide services to small businesses, including complaints handling and dispute resolution, such as the NSW Ombudsman and NSW Fair Trading. However it is evident that in today's budget-constrained environment, these bodies cannot be expected to have specialist small business knowledge or the dedicated resources to deal with all the issues which are raised by the sector. The services offered by the Small Business Commissioner will therefore complement and strengthen those services which are provided by other Government bodies.

Going forward, it is the role of the NSW Small Business Commissioner to fill this gap by providing a single point of contact for NSW small businesses into government. The Commissioner will have a real focus on provision of practical advice and assistance for small businesses and will have resources allocated specifically to assist small businesses with the wide and varied nature of the issues they face on a day-to-day basis.

The Listening Tour report can be found at www.smallbusiness.nsw.gov.au. It identifies key issues raised along with providing an initial update on work already undertaken to ensure this vital sector of the NSW economy continues to thrive.

The need for a Small Business Commissioner

When the Premier of New South Wales, the Hon. Barry O'Farrell MP, announced the appointment of the Small Business Commissioner, he stressed that he wanted the Commissioner to be a "burr under the saddle of Government". This Consultation Paper has been prepared with this in mind to provide the Commissioner with the ability to ensure that change can be effected to support small businesses and improvements to the operating environment of small businesses can be delivered.

This Consultation Paper sets the context for the Small Business Commissioner legislation and outlines some of the proposed provisions which would allow the Commissioner to carry out the role effectively.

In most cases, the Commissioner's strong working relationships will mean that disputes involving small businesses will be able to be dealt with informally. Disputes will not usually need to progress to a court or a tribunal if the Commissioner has brokered a better understanding of the issues between the parties involved. In many cases this will simply involve a few phone calls from the Commissioner's office to gather information, hear both sides of a story and smooth over misunderstandings, which in the absence of an independent party, may have unnecessarily escalated to become a costly and time-consuming legal case.

Whilst many cases will be able to be dealt with informally in this way, there is a strong need for the legislative provisions set out in this Paper, because it is acknowledged that some big businesses and government bodies will only respond to matters raised with them by the Commissioner if they are required to do so by the law. The legislation is therefore a last resort option to be used by the Commissioner only when all other methods of bringing parties together have failed. This legislation is critically important because it is in those instances that proposed legislation will bring fairness back into the equation.

The Australian context

A number of jurisdictions in Australia have appointed Small Business Commissioners in recognition of the importance of having an advocate for the small business sector. NSW is now able to identify the most effective provisions from those States and develop legislation which delivers the best possible outcome for small business in this State.

Victoria was the first of the States to appoint a Commissioner with a key role to provide mediation services in relation to retail lease disputes.

Following the successes achieved by the Victorian Commissioner, both the South Australian and Western Australian Governments have recently created positions of Small Business Commissioners.

These Commissioners are supported by legislation which allows them to deliver solutions for the small business sector. In South Australia, a Minister may prescribe an industry code to regulate the conduct of participants in an industry.

In Western Australia, the Small Business Commissioner is also the Chief Executive Officer of the Small Business Development Corporation and is tasked with delivering programs and advice to assist small businesses as well as investigating complaints about unfair market practices and providing assistance to resolve those complaints.

A Business Commissioner has also been established in Queensland with the specific role to investigate ways to reduce the red tape burden on businesses and advise the Government about how to improve regulatory issues.

The experiences in other jurisdictions puts NSW in the enviable position of being able to consider the approaches in the other jurisdictions and develop a tailored approach for NSW which takes advantage of those learnings and results in the best possible model being implemented in our State.

The needs of the small business sector

Small businesses often raise concerns about what they perceive to be unconscionable conduct (as described in the Australian Consumer Law) or unfair practices when dealing with other businesses, particularly in situations where there is a demonstration of anti-competitive behaviour.

Often in these cases larger businesses or those with more resources, are not motivated to change their behaviour, because small businesses are not typically in the financial position to take matters to court, do not have the time or skills to gather evidence of breaches of competition law, or fear retribution if they take action or make a complaint. Common complaints include small businesses having unreasonable payment terms or other conditions imposed on them.

The Commissioner has also received feedback from the small business sector that they need assistance in their dealings with State and local government bodies when they feel that they have been dealt with unfairly.

In the case of State and local government bodies, there is often a disconnect between the needs of a small business and complex bureaucratic processes which can create unfair or unreasonable burdens on businesses which are usually not intended by the government body in question.

You may notice that a definition of 'small business' has not been included in this Paper. This is because the services provided by the Commissioner are intended to be available to those businesses that need an advocate, and if a definition of small business is applied, some businesses that require assistance from the Small Business Commissioner may not be able to access the services if they do not meet the definition of a "small business". If you, as a small businesses operator, have been treated unfairly or are the subject of unconscionable conduct and need the assistance of the Commissioner, there should be no red tape which prevents you from accessing these services.

The benefits of a NSW Small Business Commissioner

For the first time in NSW, small businesses have an independent advocate to speak on their behalf. This Paper sets out how the Small Business Commissioner will have the ability to advocate for small businesses where there is the contention of unfair treatment or unconscionable conduct by another business or a government body. The Commissioner will also contribute to policy development which assists in improving the operating environment for small businesses.

The role of the Small Business Commissioner is critical, as the Office of the Small Business Commissioner is responsible for providing low cost mediation services for small businesses to keep disputes out of court – as small business can often not afford to pursue costly and lengthy legal action. The Commissioner also operates a free service which assists small businesses to navigate through government and obtain answers to specific problems and reduce bureaucratic red tape more generally.

The *Small Business Commissioner Act* will enable the Commissioner to investigate and assist in the resolution of disputes involving small businesses. The Act will also outline the Commissioner's functions and prescribe the range of mechanisms available to the Commissioner to assist small businesses in their dealings with other businesses and government bodies. The objective is to create mechanisms which motivate changes in behaviour to improve the overall operating environment for both business and government.

The Small Business Commissioner has already assisted many small business operators with issues impacting on their businesses and has been able to achieve some effective outcomes due to the cooperation and good faith of parties involved. Some examples follow:

Case 1: *Common sense during Christmas*

Traders in a metropolitan area contacted the Commissioner regarding infrastructure upgrade works being conducted along their major retail strip. The traders were concerned about the interruption to their businesses resulting from the works. These works were to be carried out for a number of months, across the peak Christmas trading period. Plus, large machinery parked in front of shop premises for the entire time would significantly reduce the number of parking spaces available for customers and block the view from the road so that the shops looked shut.

The Commissioner attended a group meeting within 2 days of being contacted and worked with the traders to find a way forward. The Commissioner then arranged a meeting with the organisation doing the upgrade works and obtained their commitment to postpone the works until a more favourable time for the business owners, after the Christmas trading season.

When works recommenced, traders were still concerned about the retail climate and the impact which the works would have on their businesses. The Commissioner brokered an agreement with the infrastructure provider for works to take place in shorter stages and at night, albeit over a longer period. This approach minimised the negative impact of the works on the businesses and assisted traders in working through an already difficult retail climate.

Case 2: *Working collaboratively with Council*

A small business operator contacted the Small Business Commissioner about the additional burden placed on his business by a local council. The small business owner wanted to place a small A-frame advertising sign on the footpath outside his shopfront, however the Council approval process for signage was unnecessarily complex and required the small business owner to submit a complete Development Application.

The Small Business Commissioner contacted the Council on behalf of the small business owner to discuss the matter and the implications on small businesses in the local area. The General Manager was very concerned to hear that council processes were placing additional burdens on small business operators, and immediately agreed to review the process.

Within weeks, the Council re-evaluated the application process for A-frame signage and designed a new application process that is now much more efficient for small business operators.

It is recognised that, despite the successes already achieved, in some circumstances, the Commissioner will require the support of a legislative framework in order to assist in the resolution of disputes and issues facing the small business sector. Not all cases will be able to be solved through the goodwill of the parties involved. The tools that will be available to the Commissioner will be critical in allowing the Commissioner to meet the objectives of the role and deliver outcomes for small businesses in NSW.

The roles of advocacy, complaint handling and mediation

The majority of Small Business Commissioners around Australia have roles as advocates for the small business sector, whilst at the same time, offering complaint handling and mediation services for disputes involving small businesses.

The Commissioner must develop strong working relationships with big businesses, as well as with small businesses. By earning the trust and respect of big business, the Commissioner will be able to help resolve issues between big and small businesses, to the benefit of both parties.

In this way, the Commissioner is really an aid to big businesses and government bodies, as much as to small businesses, because by developing strong working relationships with all parties, the Commissioner will be more likely to enable disputes to be resolved, than if those parties were left to reach a conclusion themselves, without assistance.

Advocacy

The role of Commissioner was introduced because it is considered that there are many advocates, industry bodies and lobbyists for big business and small businesses are not afforded the same opportunities to be heard. Small businesses are often not members of an industry body or business association, which further limits their opportunities. Big businesses also have a greater capacity to allocate resources to make their case to governments and run campaigns on issues of importance to them. This is not the case with small businesses.

The small business sector is such a disparate and varied sector that it is difficult for the sector to speak with a strong and unified voice. Small business operators are so busy running their businesses that they find it difficult or even impossible to take time out to lobby government for changes which could have a positive benefit on their businesses, however even if given the opportunity, many small business operators would not know where to start.

The role of the Commissioner is to unify the voices of the small business sector by working directly with small businesses and peak industry bodies such as the Council of Small Business Organisations of Australia (COSBOA) and the NSW Business Chamber, and providing opportunities to have its voice heard by government.

The Commissioner's advocacy role for individual small business cases is limited to those instances where there is an allegation of 'unfair' or unconscionable treatment of a small business.

Complaint handling

The complaint handling role of the Office of the Small Business Commissioner is essentially that of a broker. A body which has the ability to hear both sides of an argument and, with complete impartiality, can seek to take the emotion out of decision-making, and help parties to see beyond barriers to reaching a resolution which may be based on personality conflicts, retribution, or merely lack of understanding of the facts of a matter.

Mediation

While the NSW Small Business Commissioner plays a key role as an advocate for small businesses, it is important to recognise that in the Office of the Small Business Commissioner, the Commissioner is a neutral and independent person who helps parties in a dispute to reach their own solution. The Commissioner's advocacy role does not impact on the impartiality of the Commissioner's mediation services.

The role of the Office of the Small Business Commissioner is not to take sides or make a judgement about which part is right or wrong, it simply provides a starting point for small businesses to access low cost mediation services which allow parties to a dispute to resolve a situation without the need for time consuming, costly and complex legal action.

When mediation is undertaken through the Office of the Small Business Commissioner, neither party will be forced into making a decision or a commitment they do not agree with. In some cases, if mediation is unsuccessful despite the best efforts of both parties, it may be necessary for the matter to progress to another level, such as a tribunal or court.

The Office of the Small Business Commissioner currently maintains a list of independent mediators that are called upon to mediate disputes under the Retail Leases Act. It is proposed that a carefully selected panel of high quality alternative dispute resolution experts will be developed to mediate business-to-business and business-to-government disputes. In certain cases, parties may require a different form of dispute resolution by an independent and qualified professional, such as expert determination or arbitration. The parties' needs will be addressed on a case by case basis.

Legislative issues

Legislation is proposed to ensure that the Small Business Commissioner has the necessary functions, mechanisms, organisational structure and independence required to carry out the role effectively.

A. Appointment, removal and independence of the Commissioner

It is proposed that:

- The Commissioner be an independent statutory officer with the appointment and removal of the Commissioner made by the Governor of NSW. The term of the Commissioner will not exceed five years, and at the end of the term, the Commissioner will be eligible for reappointment.
- Whilst the Commissioner reports to the Minister for Small Business, the Minister be limited in the directions that may be given to the Commissioner, so that any direction given by the Minister be in writing (and only be given after consultation with the Commissioner), be included in the annual report of the Commissioner and that the Minister not be able to give a direction about an investigation, preparation or publication of a report, or mediation relating to a specific complaint.
- An annual report be tabled in Parliament, which includes an outline of the activities of the Office, data on the number of mediations undertaken, any directions given by the Minister and budget information.
- The Commissioner, the Commissioner's staff, and mediators receive protections and immunities from liability when exercising functions under the Act in good faith (similar to the protections and immunities afforded to the Legal Service Commissioner under the *Legal Profession Act 2004*).
- The existing *Small Business Development Corporation Act 1984* be repealed and replaced with the Small Business Commissioner Act as the activities which had been undertaken by the Corporation will instead form part of the new package of initiatives which will be led by the Commissioner. A Small Business Advisory Panel will be formed to provide sector-specific advice to the Commissioner, who will Chair the Panel. The Panel will report to the Minister for Small Business. The establishment of a new panel will represent an important collaborative step forward in the way the NSW Government supports small business.

Questions

1. What do you think about the proposals for the appointment and removal of the Commissioner?
2. Are there any other mechanisms that should be put in place to strengthen the role of the Commissioner?

B. Functions potentially available to the Commissioner

A range of functions are available which will enable the Commissioner to deliver an effective advocacy role and provide assistance to small businesses.

The following functions are based on those of Small Business Commissioners in other Australian states and on other complaint-handling bodies that serve a similar function to the Small Business Commissioner:

- Provide a central point of contact for small business complaints about dealings with other businesses or State or local government bodies.
- Provide low cost mediation services to attempt to resolve small business disputes. The Commissioner will have the right to decide to deal with a complaint or decline to deal with a complaint.
- Facilitate and encourage the fair treatment of small businesses in their commercial dealings with other businesses or in dealings with State or local government bodies by developing mutually beneficial linkages and ensuring practices which have the potential to impact small businesses are addressed in a collaborative manner.
- Investigate complaints which can be received by the Commissioner or investigate matters of the Commissioner's own volition, regarding allegations of unconscionable conduct or unfair practices affecting small business and facilitate resolution of such complaints or matters. This may include working collaboratively with other bodies and referring matters where appropriate.
- Monitor and report to the Minister for Small Business on any emerging trends in market practices that have an impact on small businesses.
- Review the legislative and administrative environment in NSW which has the potential to impact small businesses and advocate for the needs of the sector to be considered by government in order to minimise the regulatory burden on small business.
- Promote informed decision-making by small businesses in order to minimise disputes with other businesses or State or local government bodies.
- Assist State and local government bodies and businesses to better understand the needs of small business and improve working relationships within the sector.

Questions

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

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

C. Tools potentially available to the Commissioner

Small Business Commissioners around the country and other complaint-handling bodies have a range of tools available to them to assist in carrying out their functions. It is acknowledged that different tools will work in different circumstances, so it will be important for the NSW Small Business Commissioner to have available, at his or her discretion, a variety of tools which are suitable for use in a range of contexts. The following tools are available to consider for the NSW Small Business Commissioner:

Tools to assist small businesses in their dealings with other businesses and/or State or local government bodies

- The ability to make representations to an appropriate person, organisation or State or local government body on behalf of a small business that has made a complaint, or in the absence of a complaint, as determined by the Commissioner.
- The ability to require information from a person within a specified timeframe, in relation to dealings with small businesses which are consistent with the functions of the Commissioner. It is noted that protections for sensitive information will be necessary, such as commercial-in-confidence, cabinet-in-confidence, and privileged document exemptions.
- The ability to require a person to answer questions and otherwise assist in a matter, within a specified timeframe, to allow the Commissioner to exercise his or her functions. It is noted that protections for the subject of the questioning will be necessary, such as commercial-in-confidence, cabinet-in-confidence, and privileged document exemptions.
- The ability to seek an injunction from the Supreme Court to ensure conduct by a person, business or State or local government body does not affect an ongoing investigation.
- The ability to issue a public warning statement or an alert about matters that affect small business, where it is in the public interest.
- The ability to initiate proceedings, of the Commissioner's own volition, in a case relating to anti-competitive conduct with respect to a small business.
- The ability to make representations, or join an action, in civil proceedings brought before a court, in matters of the public interest. This is particularly important in those cases where there is a public benefit in the participation of the Commissioner to highlight to the court matters which may not otherwise be considered as part of the proceedings. This is pertinent for those cases where there is a contravention of the law, such as unconscionable conduct.
- Once the Commissioner is satisfied that there is a genuine dispute that could benefit from mediation, the Commissioner should have the appropriate tools available to encourage parties to mediate in an attempt to resolve a dispute, by way of a formal request. For example, a small business may approach the Small Business Commissioner if a government body which is responsible for making a decision which will affect the operations of a small business is taking a long time to reach a decision, and this delay is impacting on the ability of the small business to continue operating. It is acknowledged that the Commissioner will often have to work within the legislative framework which governs the decision making of a government body.

To ensure government bodies understand the importance of participating in mediation with a small business in relation to a small business dispute, it is proposed that the Small Business Commissioner will enter into a Memorandum of Understanding with government bodies which will require them to participate in mediation at the formal request of the Small Business Commissioner. Such a request would only be issued following thorough enquiries made by the Commissioner into the facts of the matter and an opportunity for the government body to make its case to the Commissioner.

To encourage private sector businesses to attend mediation with a small business in relation to small business disputes, it is proposed that private sector businesses will have the opportunity to be recognised on a published list of "small business friendly" organisations. Businesses would have the opportunity to sign an agreement with the Small Business Commissioner to use their best endeavours to work collaboratively with small businesses. They would demonstrate this ongoing commitment by agreeing (subject to agreed exemptions) to participate in mediation when a matter is raised with the Small Business Commissioner and participation in mediation is formally requested by the Commissioner. If a business was found to be non-

compliant with the “small business friendly” policy, the business may be subjected to a review process regarding its inclusion on the list.

It is further proposed that the “small business friendly” policy be adapted for local councils.

It would be important to ensure that a formal request to participate in mediation does not add expense or delay to proceedings, frustrate legitimate claims or disadvantage one or both parties. It is also acknowledged that the Commissioner would have the discretion to allow an exception to a request to participate in mediation on a case-by-case basis if the Commissioner considered this to be appropriate, such as for urgent matters where mediation may cause an unnecessary delay or whether an evaluation of the parties deems that the parties are unreasonable or unlikely to come to an agreement. A formal request by the Commissioner for a government body to participate in mediation will not interfere with its responsibility to pursue disciplinary or other enforcement action where there is a breach of legislation.

- The ability to utilise a mechanism, a “collective complaint”, to investigate an issue that has the potential to significantly harm the interests of a group of small businesses.

The United Kingdom has established a mechanism called a “super complaint”, which enables designated bodies that represent the interests of consumers to lodge a complaint to the Office of Fair Trading for investigation of particular issues that are impacting on a number of consumers. In the UK, the investigating body must respond to the complaint within 90 days.

NSW Fair Trading has established a similar process under a trial period with consumer advocate “Choice”. Choice can make complaints of this nature to NSW Fair Trading on behalf of consumers.

It is proposed that the NSW Small Business Commissioner legislation will include “collective complaint” provisions for the Small Business Commissioner to investigate or lodge these types of complaints on behalf of small businesses in situations where a number of small businesses are impacted.

It is envisioned that this mechanism could operate in a number of ways:

1. Government bodies, associations and organisations would have the ability to lodge a complaint with the Office of the Small Business Commissioner on behalf of a number of small business operators for investigation by the Small Business Commissioner. The Commissioner would be required to investigate the complaint and respond within a set period of days. This is similar to the process in the United Kingdom.
2. The Commissioner would have the ability to lodge a complaint with another government agency, inviting them to undertake an investigation on behalf of a number of small business operators without revealing the identities of the businesses involved or the particulars of evidence provided by them. This would afford small businesses with protection that they would not ordinarily receive if they made a complaint individually, and ensure that their identity and evidence would be protected unless they gave their consent for that information to be released.

The Commissioner would also monitor trends in enquiries and complaints received from small businesses and would have the ability to action a complaint (either in the form of an investigation into a matter, similar to Option 1, or by way of a referral to another government agency, similar to Option 2) once a specific number of complaints were received.

For example, the Australian Competition and Consumer Commission (ACCC) is aware of a number of market imbalances and competition matters currently impacting on small businesses, however it does not have the ability to fully investigate these practices without evidence from small businesses. The NSW Small Business Commissioner understands that many small businesses are not willing to approach government bodies like the ACCC or the Australian Securities and Investments Commission (ASIC) and make a complaint against another

business, especially those businesses they have supply arrangements with, for fear of retribution. Under this proposal, the Commissioner would be able to make representations to the ACCC or ASIC with sound evidence collected from small businesses, whilst protecting the identities of those small businesses.

Case 3: *The devil really is in the detail*

The Commissioner successfully lobbied on behalf of small businesses across NSW and the country to change onerous labelling requirements due to changes in regulation.

Under this new regulation, many businesses were required to place adhesive stickers on packaging or over warranty cards, terms and conditions or manuals, in order to ensure full compliance. In some circumstances, it required that non-compliant products be withdrawn from sale. Failure to comply could mean a fine up to \$50,000 per offence.

The Commissioner was approached by a law firm with a number of clients facing costs of hundreds of thousands of dollars plus major logistical problems if they were to meet the new requirements by 1 January 2012.

The Commissioner took these concerns to the Australian Competition & Consumer Commission (ACCC) and lobbied strongly for a more reasonable approach. The ACCC acknowledged that a change could be made and allowed retailers to use prominent point-of-sale signs outlining the changes, instead of requiring re-labelling of all products.

This was a significant development for businesses across the country, saving small businesses significant time and money. The role of the Commissioner was integral to improving the operating environment for small business.

Tools to assist small businesses in their dealings specifically with State or local government bodies

The Small Business Commissioner has already been contacted by many small businesses that require assistance from the Commissioner in dealing with government bodies at all levels. The services offered by the Small Business Commissioner differ from those offered by the NSW Ombudsman or NSW Fair Trading through its:

- provision of specialist small business knowledge
- dedication of resources to deal with small business issues in today's budget-constrained environment.

It is recognised that the Commissioner will need to implement a sound administrative process to deal with complaints about government bodies so that procedural fairness for both parties can be maintained. In doing so, it will be the absolute priority of the Small Business Commissioner to resolve matters as quickly as possible.

It is proposed that the following tools will be made available to the Commissioner to assist small businesses in their dealings with government bodies:

- The discretion to conduct an investigation into the treatment of a small business by a State or local government body. It would be important for the head of a body which is the subject of an investigation to be formally advised of the intention to investigate a complaint and be given appropriate time to respond to the Commissioner. Protection for parties subject to investigation and inspections will be developed in conjunction with stakeholders.

- Following an investigation by the Commissioner, and after providing the government body under investigation with the opportunity to comment on the findings of the draft report, the Commissioner should have the ability to issue a report to the Minister for Small Business, identifying the State or local government body and the actions of which have been found to have a negative impact on the small business sector. The report would be required to be tabled in Parliament by the Minister for Small Business.
- Arrangements which allow the Commissioner to share information with other complaint-handling bodies regarding enquiries which cross over into the jurisdiction of other bodies, taking into account the appropriate privacy considerations. The NSW Small Business Commissioner will work collaboratively with government bodies, such as the Offices of the NSW Ombudsman, NSW Cross Border Commissioner and Commissioner for Fair Trading by referring matters to those bodies which have jurisdiction or legislative responsibilities for particular matters. Other government bodies would also have the opportunity to refer matters to the Small Business Commissioner for investigation or mediation. Any matters with criminal implications would immediately be referred to the appropriate authority, such as the police.

Tools to assist small businesses in their dealings specifically with other businesses

- The ability to develop and administer an industry code which regulates the relationships between businesses in a particular industry to enable the Small Business Commissioner to assist small businesses in their dealings with larger businesses. This approach has been adopted in South Australia.

Industry codes have the potential to encourage behavioural change by members of an industry who take advantage of differences in market power to deal unfairly with small businesses. Industry codes can be developed and administered in a number of ways, including by government in consultation with industry or by industry and enforced by industry. Codes can also be an alternative to the introduction of new legislation in certain circumstances.

Whilst some small businesses may consider that the franchising sector could be an appropriate sector for this purpose, it is the NSW Government's clear commitment that there is no such role for the State at this point in time. The NSW Government has no intention to deal with franchising issues before the proposed 2013 review of the Federal Code and the Federal Government's response to that review.

- The ability to assist small businesses in the use of the collective bargaining provisions within the *Competition and Consumer Act 2010*, so that they can benefit from having a collective voice. These provisions have historically been used in the agricultural sector and may have potential to be used more widely across a range of sectors, particularly where supply chain issues exist.
- The ability to leverage the work done by Community Justice Centres (CJCs) in relation to small business disputes by referring low quantum disputes to the CJCs and providing a complementary service through the Commissioner for higher quantum disputes.

Questions

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

Questions

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?
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?
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?

D. Confidentiality

Businesses are increasingly concerned that information provided by them is handled confidentially. The need for confidentiality is increased where businesses provide information in the course of a dispute. This is the case in relation to both business to business and business to government disputes.

Accordingly, it is proposed that the NSW Small Business Commissioner Act should contain provisions to strictly regulate how information provided by, and collected from, businesses by the Commissioner in relation to particular disputes is handled.

It will be important that certain functions of the Commissioner (including the Retail Tenancy Unit) are included in Schedule 2 of the *Government Information (Public Access) Act 2009* so that information provided by parties as part of their dealings with the Commissioner or any staff is considered to be excluded information under that Act.

The Commissioner should have the ability to use information which does not identify parties for reporting purposes and for informing Government policy impacting on the small business sector.

Questions

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?
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?

CONTACT DETAILS

Phone: 1300 795 534

Fax: (02) 8222 4816

Email: sbc.legislation@smallbusiness.nsw.gov.au

Post: Office of the Small Business Commissioner, GPO Box 5477, Sydney NSW 2001

Web: www.smallbusiness.nsw.gov.au