

**The Small Business Commissioner/Advocate Model:
Some Reflections On Its Creation And Operations, 2005-6**

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Abstract

This paper provides a critical overview of a recent attempt to create an independent statutory “voice” for small enterprises within the formal government bureaucracy in one Australian jurisdiction. It discusses the creation and eighteen months of activity of the Small Business Commissioner of the Australian Capital Territory.

In 2003 the ACT government foreshadowed that, as part of its strategy to create the most small-business-friendly location in Australia, it would establish a Small Business Commissioner as a statutory appointment. The Legislative Assembly passed the *Small Business Commissioner Act* in 2004 and activity began in March 2005.

The key activities of the Commissioner have been to examine small business complaints about ACT government agencies; to promote the use of mediation and/or other alternative dispute resolution tools for the settlement of disputes between small enterprises and other businesses; to provide independent advice to the Territory government about laws, regulations and policies that may affect small firms; to oversee the introduction of small business service charters within government agencies; and to establish a more “business friendly” service culture within ACT government agencies.

On one hand, it is clear that a Commissioner role has a potentially significant strategic importance for small and medium-sized enterprises, principally through the provision of independent commentary, pushing for red tape and regulatory reduction, and by providing mediation services and investigative functions. However, there are also some current problems with the role. These include potential overlap with other regulatory and investigative bodies; lack of formal compulsive powers; its dependence on political support for its effectiveness; insufficient resources; and the nature of the relationship it has with other government entities.

Keywords:

Australia, Canberra, Australian Capital Territory, small business, public policy, service charters, mediation, Ombudsman, small business commissioner, small business advocate, SME, envoy.

Introduction

The first decade of the 21st century has seen a number of attempts to create an independent statutory “voice” for small enterprises within the formal bureaucracy of state. These have included the creation of a Small Business Advocate in the state government of South Australia, an SME Envoy within the European Union, and Small Business Commissioners within the state Australian governments of both Victoria and the Australian Capital Territory.

As other jurisdictions also consider introducing similar bodies, there are some valuable lessons to be learnt from the existing organisations. What is the most useful way to structure such a position? What should its duties and tasks be? What sort of relationship should it have with the conventional bureaucracy, and how should it be made accountable to government? Finally, are there any particular activities in which a Commissioner can be especially useful, and are there also any weaknesses or potential problems with such a position?

This paper attempts to provide an answer to some of these questions, by providing an overview about the creation and first year of operation of one particular agency – the Small Business Commissioner of the Australian Capital Territory.

Background

The Australian system of government is a federation consisting of a national (Commonwealth) government, six sovereign states, and two self-governing territories; the two territories have broadly equivalent powers to the states. The country’s constitution is drawn from the American, Swiss and British models, and theoretically provides for each state to be largely self-governing, although certain powers (such as defence) are the sole power of the federal government. However, in practice, the Commonwealth wields significantly greater *de facto* power since it is the principal taxing authority and typically ties many of its payments to the states. Executive governments are created and answerable to their respective legislatures under a Westminster-style administrative arrangement.

The range of activities undertaken by state and territory governments is substantial, and in the business domain includes the registration of business names, licensing and regulation of most trades and professions, land use and property development, and commercial tenancies.

The Australian Capital Territory is, as its name suggests, the seat of the national parliament. Like several other cities (such as Washington DC, Kuala Lumpur in Malaysia and Port Moresby in Papua New Guinea) it is separate political entity specifically designed to house the federal government, but is also self-governing in most other matters. The smallest of the Australian states and territories, the ACT has only one city within its boundaries, Canberra, and is home to approximately 350,000 residents. There were approximately 19,600 small businesses

in the ACT in 2004, employing about one-third (60,000 persons) of the territory's total workforce, and accounting for more than 96 per cent of all private sector Canberra firms (Australian Bureau of Statistics 2005).

In 2002, the ACT government began developing a series of long-term programs that were to be synthesised together into the Canberra Plan, to help guide the city-state's future development. The *ACT Economic White Paper* of 2003 suggested a number of steps to expand the role of the private sector in the local economy. Chief amongst these were a commitment to creating "the most small business-friendly jurisdiction in Australia" (ACT Government 2003: 23) and the creation of a Small Business Commissioner, largely modelled on an existing position created in Victoria in 2002.

The creation of a Commissioner was a key election commitment of the minority Labor government during the 2004 ACT elections, which resulted in the return of a majority Labor administration. Subsequent to this, the Legislative Assembly passed the *Small Business Commissioner Act 2004* on 26 August 2004. The legislation sets out the functions and powers of the Commissioner, whose role is, *inter alia*, "to enhance a competitive, co-operative and fair operating environment for small business in the ACT" (section 3) and to "...monitor and report on the impact of legislation, government procedures and administration of small businesses" (section 11(1)(h)). Other key roles are to:

- Help examine small business complaints about ACT government agencies quickly and professionally, so as to facilitate their resolution;
- Promote and facilitate the use of mediation and/or the early resolution of disputes between small enterprises and other businesses;
- Provide independent advice to the Territory government about laws, regulations and policies that may affect small firms; and
- Establish a stronger service culture within ACT government agencies towards small business, through the introduction of small business service charters and through other steps undertaken by the Commissioner.

The Commissioner does not have any powers of enforcement under the legislation. Indeed, section 11(2) specifically states that the Commissioner may not continue to investigate an issue if he becomes aware that it is the subject of any proceedings in a formal court, tribunal or other disciplinary process.

However, the Commissioner can make recommendations to the ACT government, and under section 13 of the Act, the chief executive of a government entity must cooperate with any request for information or assistance that the Commissioner reasonably requests for the exercise of his functions. The Act also spells out the process of appointment of the Commissioner,

provides immunity from suit for actions of the Commissioner and his or her staff, and provides conditions regarding termination of the office-holder.

As a statutory officer, the commissioner operates at arm's length from government and reports directly to the Minister for Economic Development and Business. The Commissioner is largely independent of direct political and administrative control, although under section 12 the Minister may formally give the Commissioner written directions about how to operate. The Commissioner is also required to publish his own Annual Report to the ACT Legislative Assembly each year, and is subject to the same parliamentary scrutiny as any other statutory agency of government.

Interestingly, the Act does not seek to formally define what constitutes a "small business" for the purpose of the Commissioner's work. It also explicitly includes not-for-profit organisations within its ambit.

Achievements To Date

The work of the SBC commenced on March 1st 2005, with a full-time Commissioner and two full-time staff, operating on an annual budget allocation of approximately AUD \$346,000. During that time, five key functions have been identified and implemented (ACT Small Business Commissioner 2005a).

The first was the operation of a small business complaints and dispute handling service, as required under the Act. The SBC provides two services directly to small firms: business-to-business dispute mediation (helping firms sort out disputes they have with each other) and investigating complaints or grievances firms have about ACT government agencies. Between its commencement in March 2005 and June 2006, the Small Business Commissioner received a total of 80 approaches from small businesses, including 53 were business-to-business complaints and 23 were business-to-government complaints. This level of complaint has also reinforced the need for local access to professional business mediators. A discussion paper regarding the development of a user-pays mediation service was written and released in October 2005 (ACT Small Business Commissioner 2005b); by the end of June 2006, detailed negotiations were underway with non-government providers to commence such a facility later in the year.

The second was to attempt to introduce small business service charters into a range of Territory government agencies. The *Small Business Commissioner Act* stipulates that such documents should be introduced throughout the ACT public sector, as a means of making government more sensitive to the needs of local firms and to reduce the regulatory burden on firms. A discussion paper on the topic was written and released in May 2005 (ACT Small Business Commissioner 2005c), and all existing ACT government departments were requested by the Minister for Economic Development and Business to prepare and implement a formal written

charter by the end of 2005. As at the end of June 2006, ten of the requested eleven charters had been prepared.

Just as important as the implementation of the formal statutory tasks of the Commissioner has been the more intangible role of consultation with the local business community. An active public profile is important in winning over the support of local stakeholders, understanding the concerns of local enterprises, and being seen as an effective public advocate on behalf of the sector. In 2005/06 the Small Business Commissioner, on average, responded to 129 contacts per month from the Canberra business community, composed of 29 face-to-face meetings, 81 e-mails and 19 phone calls. (The total number of monthly contacts is actually higher, since the above figures do not include contacts initiated by the office.) This has been used to provide comment on several Cabinet submissions, give a personal Cabinet briefing in May 2005, and for policy discussions with various ACT agencies. During the year, a total of 8 press releases were issued, and the work of the SBC featured in over 75 newspaper, magazine, radio and television reports. The Commissioner made over two dozen speeches to local business organisations, and held over 100 meetings with industry groups and representatives

The fourth element of the role has been advocacy of changes to government policies and procedures. This has taken place both within the established processes of government (which includes formal comment on pending Cabinet submissions, participation in policy deliberations by other government agencies, formal membership of various small business advisory committees, and monthly briefings to the Minister) and through external channels such as newspapers, public forums and media statements. The Commissioner has lobbied for increased co-ordination of business licensing regimes across state and territory borders; easier business access to the Small Claims Court in the local legal system; changes to the goods and services tax registration process for microfirms; and reform of the business names registration system (ACT Small Business Commissioner 2006).

A final task has been involvement with the ACT government's Small and Micro Business Advisory Council. The Council exists to provide a formal consultative mechanism between the Minister for Economic Development and local firms. It consists of nine owner-managers of local firms appointed by the Minister for a two-year term. In November 2005, the Commissioner voluntarily took over the role of chairing the new Council on behalf of the Minister. SMBAC meets every second month, and has now formed three working parties to investigate government regulations, existing business programs, and to review business service charters.

Other Similar Models

The ACT Small Business Commissioner is by no means the first or only attempt to create an independent advocate or ombudsman-like position within the apparatus of government. In recent years, a number of other regions have begun to create their own “independent advocates” for small business

In 1997, the state government of South Australia created a “Small Business Advocate,” a position established by administrative action of the Minister rather than through a specific piece of legislation. The Advocate reports directly to the Minister, and operated as an independent office until mid-2004, since when the role has been filled by the Director of the Office of Small Business within the state government’s Department of Trade and Economic Development.

The Victorian SBC was established in May 2003 under the Victorian *Small Business Commissioner Act 2003*, which also served as the template for the Canberra model. Whilst the Victorian Commissioner has most of the powers provided for the ACT Commissioner, a key difference has been the former’s involvement in the compulsory mediation of retail tenancy disputes in that state. Under the Victorian *Retail Leases Act 2003*, the commissioner is responsible for providing mediation on retail tenancy disputes. In the 2004-5 financial year, the Victorian SBC dealt with \$80 million worth of disputes, and was processed some 830 disputes (Victorian Small Business Commissioner 2005).

A third variation of this model has been the SME Envoy created by the European Union in 2001. The Envoy was created to act as both an external link between the European Commission and the small business community, as well as an internal resource for the development of appropriate policies. It also receives complaints and queries from European firms, and meets regularly with European business organisations (Commission of the European Communities 2003).

Finally, there is also a National Ombudsman within the US Small Business Administration, created as part of the US federal *Small Business Regulatory Enforcement Fairness Act* of 1996 (US Small Business Administration 2004). The Ombudsman conducts hearings into federal regulatory enforcement activities, receives feedback on the impact of government agencies on small firms, and suggests ways in which problems can be remedied.

Issues and Problems

Whilst one year is not a particularly lengthy time period, it is perhaps long enough to make some observations as to what works effectively, and to identify some shortcomings of the Commissioner model.

On one hand, it is clear that the SBC can potentially play a significant strategic role on behalf of small and medium-sized enterprises, principally through the provision of independent commentary within government, pushing for red tape and regulatory reduction, and by providing mediation services and investigative functions. In this sense, it can often be a highly effective advocate for the sector.

A critical issue is the statutory independence of the Commissioner. An independent body at arms' length from government is essential to perform the higher level reporting and review functions that are needed to properly scrutinise departmental programs and policies. The Commissioner, for example, reports annually to the Legislative Assembly on the performance of government agencies in dealing with SME issues, can publicly identify wayward agencies and regulatory obstructions, and has the capacity to assess the government's broad policy achievements in the sector. The Commissioner also brings a new perspective on issues and trends, which may be lost if it is only one function amongst many in a large department or agency.

The SBC also provides an important role in liaising with the business community to identify regulatory problems, suggest solutions to these, and to pressure government for such reform. Whilst some parts of this process can be done within a department, statutory independence allows the Commissioner to publicly advocate for change and to suggest ideas that the normal administrative and political process may otherwise quash.

Finally, the SBC has important complaint investigation, dispute-handling and mediation functions. The rationale for providing these is that many small firms find it hard to navigate the maze of rules when in conflict with government agencies and other businesses. A mediation service provides a cost-effective means of resolving disputes, and can also potentially reduce the number of formal disputes being referred to the ACT's lengthy court lists. Dispute handling is not a conventional activity for most government departments, which usually confine themselves to policy formulation and implementation issues.

However, there are some problems with the role as it is presently constituted. These include overlap with other regulatory and investigative bodies; lack of formal compulsive powers; its dependence on political support for its effectiveness; insufficient resources; and the nature of the relationship it has with other government entities.

The Commissioner has a statutory responsibility to investigate business complaints, but these duties duplicate many of the functions undertaken by other government bodies, both at the territory and national level. For example, the ACT and Commonwealth Ombudsman can both investigate issues dealt with by the SBC. Other issues referred to the SBC are also able to be investigated by bodies such as the Australian Competition and Consumer Commission and the ACT Department of Fair Trading. Such overlap is confusing and inefficient, and a poor use of taxpayer funds. This can also result in a measure of "complaint shopping," whereby aggrieved individuals may take the one case to successive different agencies, each of whom then con-

duct their own investigation, tying up significant resources to simply re-achieve the original outcome.

In the current operations of the SBC, this has been addressed by the Commissioner's explicit decision to act as a referral source, rather than an investigating authority, wherever possible. When a complaint is received, the issue is examined, details confirmed, and the most appropriate dispute-resolution or investigative process identified. The client is then referred to this source. The SBC only retains carriage of complaints which cannot be dealt with satisfactorily by existing processes.

The overlap is compounded by the fact that the *Small Business Commissioner Act* gives the Commissioner very few formal powers. Whilst Ombudsmen have considerable legal right to investigate matters, compel evidence and protect their enquiries from the legal discovery process, the Commissioner does not. And unlike the Victorian Commissioner in some cases, the Canberra SBC does not have the power to compel parties to participate in either an enquiry or a mediation process. This significantly weakens the Commissioner's investigative powers.

In a practical sense, the Commissioner still also relies on government for it to be effective, and this limits its capacity to be overtly critical of any government activities. Political support is necessary, since the relevant Minister has the capacity to ultimately direct the work of the SBC (although this function has never yet been used). It is also necessary because policy changes within government can only be directed by Ministers and the Cabinet – the Commissioner does not have the legal capacity to force government bodies to change their policies, procedures or internal culture. Finally, the SBC is also reliant on the goodwill of government in so far as it relies on government budget allocations to provide it with adequate resources.

There also remains some legal confusion about the extent to which the SBC must answer to other branches of government. For example, at present the Commissioner is grouped alongside the Department of Economic Development, although the SBC maintains that it is legally separate from the DED administrative unit and is not subject to the direction of the Chief Executive of DED. However, the *Financial Management Act 1996* does not provide for the funding of independent statutory authorities as separate entities. All the Commission's funding is thus provided by way of a parliamentary budget appropriation allocated to DED, and specifically denoted in the budgetary papers as funding dedicated to the Commissioner. However, it is unclear if the Commissioner has only delegated authority to spend these and whether the Chief Executive of DED retains ultimate control of the Commission's finances.

Setting Up the Model: Issues for Other Jurisdictions to Consider

It may be that the creation of a Commissioner, Advocate or similar position is merely a passing trend that will not be repeated by other governments. However, there is also an increasing

number of commentators and business lobby groups who have begun to call for the creation of more such positions, especially at the national level.

Before other jurisdictions decide to adopt this model, there are some questions they need to investigate. These include the following:

- *Should the position have its own governing legislation?* This gives it more powers, but makes it difficult for government to close or alter the Commissioner's activities if it is unhappy with them.
- *What formal powers will it have?* Will it have, like the Victorian SBC, a series of legally defined powers, or will the law simply set out a set of broad generic goals that can sometimes leave the Commissioner without any real capacity to effect change?
- *What will its relationship to conventional government departments be?* The ability to have full functional and administrative autonomy is important if the position is to have genuine independence.
- *What potential for overlap is there?* The creation of a position that simply replicates an existing set of investigative or dispute settling powers can frequently just lead to confusion. In the case of the SBC, this has been eliminated by the legislative clause requiring the Commissioner to disengage from any investigation if formal proceedings have already commenced in another court or tribunal. However, this may not always be the most effective mechanism.
- *What are the most suitable performance indicators?* Objectively measuring and evaluating the output of a Commissioner or Advocate can be hard to achieve. What are the suitable most indicators to measure the outputs of such an office? Is it, for example, the number of complaints received or dealt with? The number of policy suggestions put forwards? The number of meetings or consultations the Commissioner engages in? This is an issue open to wide interpretation.

Conclusion

In June 2006 the ACT government announced that it was facing a substantial budget deficit. A Strategic and Functional Review Committee appointed by Cabinet recommended that, as part of its cost-saving measures, several independent statutory offices and organisations be wound up merged or restructured to save costs. The office of the Small Business Commissioner was one of the positions so eliminated.

Whilst it has been disappointing to see the project end in such a manner, before its true value could be determined, it is significant that other governments have already begun to consider introducing a similar model.

In its limited time in existence and with very limited resources, the SBC attempted to meet as many of its legislated responsibilities as was possible. It is difficult to measure just how effective or not the Commissioner's office has been, due to the lack of agreed performance criteria,

and because comparative data with other states is difficult to provide, given that only one other Australian state (Victoria) also has a Commissioner position.

On one hand, it is clear that a Commissioner position has a potentially significant strategic importance for small and medium-sized enterprises, principally through the provision of independent commentary, pushing for red tape and regulatory reduction, overseeing culture change in the public sector, and by providing mediation services and investigative functions. However, there are some problems with the role as it has operated within the ACT. These include overlap with other regulatory and investigative bodies; a lack of formal compulsive powers; its dependence on political support for its effectiveness; insufficient resources; and the nature of the relationship it has with other government entities. These will, no doubt, be challenges for other jurisdictions to consider if and when they move to adopt such a position in their own system of government.

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