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**Submission to the Review of the powers and role of the Victorian Small Business Commissioner**

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## A. Introduction

Independent Contractors Australia has been and is a strong supporter of the Victorian Small Business Commissioner (SBC) both in terms of its design and its implementation since 2003. In fact ICA has actively promoted the SBC model to other states and the Commonwealth. We are pleased to see similar SBC models operating in Western Australia, South Australia and New South Wales. We congratulate successive Victorian governments on the creation of the SBC and its success over the last decade. It has been pleasing to see cross-party political support for the SBC.

Given the experience of the Victorian SBC it is timely that this review be undertaken.

## B. Overview of the principles and value of the SBC and ICA's recommendation

The key problem that small business people face in their dealings with large organizations (private and public sector) is that the theory of the law of commercial contract does not apply in practice.

Conceptually, commercial contract law affords each party to a contract equal rights to enforce the terms of the contract. In practice the larger party is able to intimidate the smaller party into submission because the larger party has the capacity to pay for the legal costs of contract enforcement whereas the smaller party generally cannot afford the legal fees. This reduces the levels of trust that are so pivotal to successful commercial transactions and that underpin a healthy, vibrant economy.

In providing dispute-mediation services, the Victorian SBC brings some level of practical balance into commercial relationships between big and small businesses. This enhances trust in commercial transactions, making for a better Victorian economy.

The key value of the Victorian SBC is that it provides a cheap, non-legalistic, dispute-mediation service. The SBC is focused on resolving disputes and assisting parties to stay in business together. ICA strongly supports this focus. ICA has referred several small business people to the SBC with very positive results for them.

However, there is an issue that should be addressed. There are some large businesses and government departments that choose to ignore any SBC mediation approach and instead use their capacity to fund litigation to intimidate small business people into submission. ICA has had direct experience with this. Such action may be legal but ICA finds this approach to be entirely unacceptable and negative as regards the contractual rights of small business people and the better functioning of the Victorian economy.

Recommendation Overview

ICA strongly recommends that the mediation powers of the SBC be 'beefed up,' so that large businesses and government departments feel that they cannot afford to ignore genuine involvement in the SBC dispute-resolution process. However, there is a balance to be struck. The SBC should *not* become a regulator, arbitrator or quasi-tribunal. Our comments below in answer to the Review questions are framed within the context of a balanced 'beefing up' of SBC powers.

We also make a recommendation for changes to the Victorian Owner-Driver laws that are related to the SBC's powers.

## C. Response to the Review questions

1. Should the Victorian Small Business Commissioner's (VSBC) functions of investigation and resolution of complaints by small and medium sized (SME) businesses about 'unfair market practices' be extended to include the investigation and resolution of complaints by SME businesses regarding 'commercial dealings'?

   ICA response: Yes: In general we would support the extension of the SBC's reach to 'commercial dealings.'

   Explanation: We do not pretend to understand the fine legal definition between 'unfair market practices' and 'commercial dealings'. However, if larger organizations seek to use such fine legal definitions as an argument to not be involved in an SBC mediation offer, we would see this as a sign of lack of good intent and good faith on behalf of those organisations. If extending the SBC's reach to cover 'commercial dealings' removed such arguments by larger organizations, we would see this as a positive step.

2. Should the mediation functions of the VSBC in the Small Business Commissioner Act 2003 (the SBC Act) be broadened to 'alternative dispute resolution' (ADR) services?

   ICA response: Yes.

   Explanation: It would add to the SBC effectiveness if the SBC had discretion to use appropriate ADR services from a wide basket of ADR options. This would enable the SBC to pick and choose ADR services that most suited the circumstances of each situation brought before the SBC. Conceptually, this should make the use of the SBC's resources more targeted and thus effective and efficient.

3. Should the VSBC be given the discretion to decide how best to assist with a dispute, including being able to decline to deal with a complaint if the VSBC is of the opinion that the complaint is vexatious or trivial?

   ICA response: Yes.

   Explanation: We would assume that most complaints are brought by small businesses against large organizations. In this context there should be no assumption that small business people will always be in the right or that they won't act vexatiously. For the SBC to be truly effective it must have a reputation for acting in the interests of fairness and balance and without pre-assumptions about either party. Therefore, the SBC should have maximum discretion in they way it handles cases and which cases it handles. If the SBC comes to the view that a case is trivial or vexatious, the SBC should have the capacity to reject the case.

4. Should the SBC Act be amended to clarify the role of the VSBC in assisting SME businesses in disputes with government, including local government?

   ICA response: Yes, but do more than just 'clarify.'

   ICA recommends that the Victorian government make a commercial decision to require of all government departments, that if a department is in dispute with a small business, that the department must refer the dispute first to the SBC for ADR. Only after SBC-organised ADR has been completed (assuming no resolution) should a government department be able to contemplate pursuing the dispute through the courts. This should also be required of local councils.

Explanation: ICA sees this as a most important step. Of late, Australian governments have sought to portray themselves as 'model litigants'. It would be more productive of governments to see themselves and act as 'model resolvers of commercial disputes'. The aim should be to avoid litigation and focus on commercial solutions to what are always commercial issues. This should be paramount in government dealings with small business.

From ICA's experiences (in assisting small business people in disputes with large organizations) commercial common sense is too often removed from the equation. Most frequently, and this applies particularly with government departments, the organization's officer/s directly involved in the issue is side-lined to the background and lawyers take over. The resolution process then becomes highly complex, expensive and drawn out. Frequently in the large organization, this process results in the 'left hand' not knowing what the 'right hand' is doing. This 'silo' syndrome of bureaucracy works against good commercial results.

The advantage of the SBC is that the dispute process is pulled back reasonably early in the piece to a commercial focus. This is good for small business and for government organizations.

ICA recommends going further than just 'clarifying'. We suggest that the Act make it a requirement that government organizations must refer an unresolved dispute first to SBC-organised ADR before litigation can be contemplated.

The outcome of this should be a greater level of commercial focus and efficiency within the public sector in their dealings with small business. This benefits the government sector, small businesses and the Victorian economy. Such an initiative should be viewed as an important micro-economic reform.

5. Should the SBC Act be amended to stipulate that any commercial lease dispute must first be referred to the VSBC for ADR before it can proceed to VCAT? If yes, what exemptions (if any) should apply?

ICA response: In general, yes.

Explanation: The process is the same as we recommend in relation to government organizations as at (4) above. It makes common, commercial and economic sense to have disputes go through an ADR process first before proceeding to litigation. It creates a primary focus on commercial outcomes rather than legal ones. There should also be significant benefits in improving the efficiency of the courts, through (conceptually) fewer disputes proceeding to court.

In relation to commercial leases we are not familiar enough with the issues to suggest what, if any, exemptions should apply.

6. Should the VSBC's power to seek assistance and information from public entities be extended to include government departments, local councils, individuals and businesses?

   ICA response: Yes.

7. Should individuals, businesses and government agencies have stronger obligations to provide assistance and information to the VSBC in good faith, subject to relevant statutory exceptions and/or where public disclosure of information might not be in the public interest?

   ICA response: Yes

   Explanation: The power of an SBC to require parties to produce evidence and information was an initiative of the South Australian SBC legislation. It is, we believe, also a feature of the New South Wales SBC Bill. The SA Act has penalties for failing to produce required information whereas the NSW Bill has no penalties.

   The Victorian SBC should have the power to require parties to produce information. This gives the SBC additional 'teeth' without 'tripping over' into the SBC becoming a quasi-court. It is this sort of 'tickling up' of the SBC's powers that we believe is necessary to increase further the effectiveness of the SBC.

   We have an open mind as to whether penalties should apply or not for failure to respond to a request for information.

8. Should the VSBC have the power to list in its Annual Report businesses and government agencies which unreasonably fail to provide information relevant to a dispute or participate in ADR?

   ICA response: Yes

9. Should the VSBC have the power to issue certificates for commercial disputes voluntarily brought by an SME business owner to the VSBC?

ICA response: Yes

10. Should the VSBC have the capacity to seek an advisory opinion from the Victorian Civil and Administrative Tribunal (VCAT) when it is in the public interest to do so?

ICA response: Yes

11. Should the VSBC's functions be broadened to assist with the development and provision of dispute-resolution services under industry codes of practice?

ICA response: Yes, with qualifications.

Explanation: We do not favour the VSBC becoming a creator or administrator of codes as has occurred in the SA SBC. The creation, approval and administration of codes are more efficiently and appropriately handled at the national level through the ACCC. If codes are specifically to be created in Victoria—say, for example, due to a failure at the national level—the creation of codes should be through an Act of the Victorian Parliament as occurred with the Victorian Owner-Driver laws.

There is, however, a strong role for the VSBC to be actively involved in coordinating and working with the ACCC, other state SBCs and state industry bodies in the modelling, reviewing and identifying of the need for codes.

This is an area where the Australian jurisdictions should strive to co-operate and work together as a Federation. That is, do at the national level those things that can aid consistency and clarity across the nation—namely, single design industry codes. Further, to do at the local state level those things that can be done well locally—namely, bring a practical knowledge to the specific circumstances that may apply in each state. The provision of practical local knowledge from each state should result in better codes being created.

We see it also as a positive to have the SBC involved in the provision of dispute-resolution services under codes of practices. For small businesses dispute resolution is always best handled at the local level. In addition, in handling code disputes through the SBC, the SBC gains a good practical knowledge of issues that can be fed through to the ACCC and other state SBCs for the purposes of code review.

12. Should the Commissioner and mediators operating within the Office of the VSBC receive statutory protection and immunities from liability when exercising in good faith their legislative functions?

    ICA response: Yes

    Explanation: We do not see how the Commissioner and mediators could adequately assist with ADR if they were at risk of liability when acting in good faith. The constraints they would operate under would significantly limit ADR effectiveness.

**D. Owner Drivers and Forestry Contractors Act 2005 - SECT 48**

ICA Comment: ICA views the Victorian Owner Drivers Act as the best of all the owner-driver laws applying across Australia. By and large the Victorian Act retains a focus on the commercial, small business nature of being an owner-driver and provides practical advice and requirements to support the business and commercial nature of owner-driver activities.

Other jurisdictions (NSW for example), treat small business owner-drivers as if they are employees subject to industrial relations-style control of their contracts, including pricing control. Effectively their small business capacity is limited, controlled and in some respects neutered in NSW.

The Victorian owner-driver laws have dispute resolution power vested in VCAT, however disputes must first be referred to the Small Business Commissioner for mediation. The process and jurisdiction for dispute mediation are all commercial as they should be for small business owner-drivers. However, there is a trigger in the Victorian Act that creates the opportunity for price control across a 'class' of contracts thus treating owner-drivers as if they are employees subject to industrial relations-type treatment.

The provision is clause 48 (see below) that enables VCAT to apply a decision on one contract to a 'class of contracts'. A key feature of commercial contracts is that each contracts stand on 'it own legs'. Each contract circumstance is unique and must be considered and judged individually. This is the nature of being in business and commerce.

In contrast, industrial relations law creates and enforces classes of employees and controls employee remuneration across the 'class'. Clause 48 is a power that, if exercised, destroys the essential commercial nature of commercial contracts turning those contracts into quasi-employee contracts under quasi-industrial relations style control. It is a provision that turns owner-drivers into quasi-employees. (We note, however, that this provision has not so far been exercised to our knowledge.)

This is an issue that perhaps only indirectly relates to the SBC Review. However, as the SBC is a required mediation step prior to a VCAT determination, any exercise of clause 48 would come as a consequence of involvement by the SBC. This being the

case we consider it relevant to raise the issue in our SBC Review response.

ICA recommendation:
That clause 48 of the Owner Drivers and Forestry Contractors Act 2005 be repealed.

> 48. What is the extension of a contract variation order?
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> (1) The extension of a contract variation order is an order made by the Tribunal declaring that a contract variation order is, subject to any conditions, exceptions or limitations that are specified in the order, extended generally to regulated contracts of a specified class.
>
> (2) An order extending a contract variation order has the effect of binding all hirers and contractors who enter, or have entered, into regulated contracts of the specified class.
>
> (3) If an order extending a contract variation order is made, subject to any conditions, exceptions and limitations that are specified in the order-
>
> (a) if the contract variation order declared a term of a regulated contract void-any equivalent term in a regulated contract in the specified class is void;
>
> (b) if the contract variation order inserted a term into a regulated contract-that term is inserted into each regulated contract in the specified class that does not contain the term;
>
> (c) if the contract variation order otherwise varied a regulated contract-each regulated contract in the specified class is taken to be varied accordingly.