Written evidence for the Department of Business, Innovation and Skills: a small business commissioner

About ACCA
ACCA is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people around the world who seek a rewarding career in accountancy, finance and management.

ACCA has 187,500 members and 483,000 students in 180 countries, and works to help them to develop successful careers in accounting and business, with the skills required by employers. We work through a network of over 95 offices and centers and more than 8,500 Approved Employers worldwide, who provide high standards of employee learning and development. Through our public interest remit, we promote appropriate regulation of accounting and conduct relevant research to ensure accountancy continues to grow in reputation and influence.

The expertise of our senior members and in-house technical experts allows ACCA to provide informed opinion on a range of financial, governance, regulatory, public sector and business areas, including: taxation (business and personal); small business; pensions; education; and corporate governance and corporate social responsibility. Small Business is an important area for ACCA and our focus is on building effective capacity through our work on access to finance and strengthening financial skills and capacity.

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Executive summary
ACCA welcomes the opportunity to respond to the call for evidence by the Department of Business, Innovation and Skills on its proposal to set up a Small Business Commissioner.

ACCA members work across businesses of all sizes. Businesses rely to a great extent on external accountants and our research demonstrates that this relationship remains even after they have built their own in-house finance teams. This bond, based on competence and trust, has earned practitioners their reputation as SMEs' most trusted advisers. Financial expertise and capabilities, correctly matched to the business’s changing needs, help SMEs grow and hence the demand for the complete finance professional.

ACCA believes that integral to the success of the Commissioner is ensuring that businesses of all sizes are involved and that prompt payment and ‘fair’ contractual terms should be viewed as an inherent part of corporate social responsibility and as such large firms should publish their payment practices. We welcome the Commissioner having the ability to look into issues which while lacking the requirements for a legal dispute nevertheless could be deemed bad business practice.

As an organisation that represents members working across businesses of all sizes we recognise the complicated nature of disputes and supply chain finance. ACCA has recently been given regulator status by the Chartered Trading Standard Institute and from October 2015 members and firms, who are regulated by ACCA will be required to direct their clients towards ACCA’s assessment department, who will evaluate the complaint for its suitability to conciliation. We support the government in its move to support mediation and offer practical advice to parties who seek to resolve disputes quickly. ACCA is however concerned that there could be a real risk of the role of the commissioner becoming little more than a symbolic sinecure if appropriate transparency and accountability measures are not introduced as part of the overall mechanism. Alongside this there must be a formal requirement for approved mediators to ensure standards are met with the Commissioner working to ensure costs of any services are transparent and manageable for SMEs.

ACCA believes that for the Commissioner to be effective firms of all sizes should be engaged in the service.
Question 1: What evidence do you have of unfair or unfavourable treatment of small businesses in contract negotiations during the last 2 years?

Globalisation has created internationally dispersed supply chains as production has been relocated to emerging markets, logistics have become more cost effective and global communications easier and pervasive. Large buying organisations are much more sensitive to the inherent risks within, and the resilience of, their supply chains, as critical product components are frequently dependent on third party suppliers. This has obvious complications for contract negotiations which often involve a web of organisations. The commissioner must ensure that contracts are viewed through the supply chain and not on a company by company basis.

ACCA believes that the scope of work should concentrate on contractual terms, especially payment terms but could also look at where business has been excluded via procurement. ACCA welcomes the work the Government have done to involve SMEs in government procurement contracts and feels this should be an area of focus for the commissioner.

Much of the evidence around unfavourable treatment of small businesses in contract negotiations tends to be anecdotal as SMEs have a reluctance to highlight these disputes or a lack of time to be able to respond. Below we have used examples of illustrate the above.

ACCA receives a number of complaints per month, these come from a variety of sources, companies of various size and individual consumers.

Question 2: What circumstances can make these practices unfair to small businesses?

Many unfavourable treatments that may be encountered by a small business do not become apparent until sometime after the contract has been entered into. Awareness of the problems that are created is often not encountered until a problem or issue arises that exposes the issues with the original agreement. These can all come once significant periods of time have elapsed from the original agreement. Small businesses can then find themselves facing costs in dealing with the matter that could cause the business to close. This can be particularly unfair to small businesses that may not have the expertise to identify these issues at construction and there can be significant power (and financial) imbalances between the contracting parties.

The Commissioner must strike a balance between illegal acts, which can generally be understood and dealt with and certain legal terms which whilst legal might be deemed
unfavourable or an abuse of power. Any guidance issued will need to be extremely clear about what it is seeking to achieve and what and how it will be enforced.

**Question 3:** Have you ever tried to challenge proposed contract terms or arrangements, or refused to enter a contract including terms, that are unfavourable or you believe unfair? If you have, under what circumstances and what was the outcome? If not, why not? Please provide specific examples (which may be anonymised) wherever possible.

SMEs often aim to negotiate with the person in charge of the contract but are often limited in the sanctions they can take. Our experience is they do not proceed down a route of resolving the matter until the relationship has been broken for whatever reason. The most common option is to do nothing as they are unsure where to turn and the process would cost both in a monetary sense and the opportunity cost in dedicating their time to the matter.

**Question 4:** Do you have concerns about any of the practices in the table above? Are there circumstances in which the practices are particularly problematic for the day-to-day running of your business?

ACCA believes the definition of ‘extended payment terms’ should also include variations where businesses are pushed into using supply chain finance. We would add that the definitions offered fail to recognise the issue of where suppliers are expected to keep exclusive stocks of products at high levels without any guarantee of order or drawdown.

**Question 5:** Are there any circumstances in which the practices listed in the table are acceptable? Are there circumstances in which they can benefit suppliers? If so, how?

Prompt payment discount can be hugely beneficial but must be initiated by the supplier and not the customer.

When both parties agree other beneficial practices include ‘damage and waste payments’ (including time sensitive) when contamination of goods or advice would result in the supply being of no or negligible value. These need to be considered on a case by case basis.

**Question 6:** Have you ever experienced any of the practices listed in the table above? If yes, which ones, when and how many times? Did they benefit or harm you?

The practices described are not uncommon to our members but the most common comments relate to payment terms.

**Question 7:** Are there unfavourable or unfair payment practices which you have encountered? Please provide examples (these may be anonymised)
Examples of unfair payment practices in relation to small businesses are common.

Recovering money from large entities can be very difficult. Large entities are aware of the costs and time that is involved in seeking recourse. They are then able to use this to their advantage when dealing with a smaller firm.

Examples of this are;

Not engaging with the dispute until the last minute or the final day that they are permitted to do so. This prolongs the process and in some cases the smaller business may not be able to survive until the settlement is reached. The larger companies are aware of this and use it to their advantage.

Large companies are also aware of the cost of the litigation and that alone can be prohibitive to a small business. A large company may not engage at all until a solicitor has been instructed. Usually in this circumstance any solicitor will require a ‘fighting fund’ to be paid before taking any action. A large company can withhold payment until litigation is started. This is more common with larger sums of money owed that are not covered by the small claims track.

Many large companies have legal teams in house, and a lot of expertise to draw on. This is the opposite of what is available to a small business and if a dispute develops the large company can pass the matter to these people who will take advantage of the lack of resources and expertise that the small company can draw on.

All the above examples have come from empirical experience of ADR, complaint handling and litigation.

**Question 8:** If you are a small business, or a representative organisation for small businesses, what could be done to encourage more businesses to claim interest and late payment charges where appropriate and create an environment in which this is considered the norm?

ACCA welcomes the introduction of publication of payment terms and practices; we believe this move will encourage a change in culture. We suggest that it would be useful if alongside this any complaints and alternative dispute resolution processes were considered by internal audit committees and disclosed within the reports issued by large businesses. It could also be part of any integrated reporting statement of the business.

**Question 9:** How could the new commissioner be helpful in resolving late payment disputes?

The issue of late payment goes to the heart of corporate responsibility, and ACCA believes that this aspect should be given more emphasis in the future. Disclosure of payment policies and performance should be seen as a key element of corporate responsibility not least because of the possible consequences of individual companies’
actions for the wider supply chain. However, because of its importance we urge the commissioner not to review incidences in isolation.

The recovery of late payments is time consuming and costly to a small business. The methods used by the small business in terms of negotiation are often ineffective due to the emotional involvement that the representative may have. This emotional investment personalises the dispute and makes reaching an objective position very difficult. Formal training in negotiation or dispute resolution is very rare. Issues that can be resolved by someone who has expertise in this area with ease can be almost impossible for individuals who have no training.

The proposed commissioner can provide a neutral and objective point of view in a dispute that is often beyond the parties involved. The role of the commissioner is similar to the recently proposed ADR officers under the EU ADR Directive, due to come into force in October 2015. The involvement of a skilled third party neutral who can facilitate and negotiate a resolution should not be underestimated, the potential implications for a small business to have access to resources such as the proposed commissioners are huge, and usually the reserve of large corporations or entities.

Rather than protracted and costly litigation, or fruitless and time consuming attempts at negotiation, a small business can approach the commissioner and come to an amicable party led resolution. One of the main advantages to ADR processes is the ability to preserve a relationship that would potentially be destroyed through traditional resolution mechanisms. This is of particular value to a small business. There may be a genuine reason for a late payment and the commissioner would need to be able to communicate between the parties in a way that both understand the others position and any resolution preserves the business relationship.

**Question 10:** Have you ever taken action to resolve disputes about these wider supply chain issues? If yes, under what circumstances and what was the outcome? If not what deterred you? (Examples may be anonymised)

**Question 11:** How could the new commissioner be helpful in resolving these disputes?

Supply chain disputes can cause problems for small businesses which typically manifest in damage to reputation, penalty clauses or customers going elsewhere. This can be due to no fault of the business itself and the issues are often beyond the control of the business.

The commissioner can be helpful in facilitating communication between the parties, which has often broken down. This will enable a better resolution to be reached without the need to invoke further mechanisms. In this type of dispute ensuring that there is effective, continuous communication can make all the difference. This can be extended
to communication between the client and the business. The inherent freedom of the ADR process enables the commissioner to be creative in how the issues are resolved, for example; waiving of fees, discounts for supply deadlines not being met, signposting and advising the business on the best way to keep the customer engaged.

**Question 12:** Do you agree that the commissioner should provide general information and advice to small businesses on a confidential basis, in relation to a dispute with businesses that are medium or large?

Yes. There can be power and financial imbalances between businesses, where one party has more funds or resources available to them. The remit of the commissioner to provide information or advice to small businesses may help to address these imbalances and address the issues that small businesses face when in dispute with a more powerful party. The type of expertise that the commissioner would be able to provide may usually not be available to a small business due to either lack of awareness or prohibitive costs.

Advice such as this should be one of the key roles of the commissioner. Consideration should be given to the commissioner becoming more involved in facilitating a resolution for any dispute that arises.

**Question 13:** If you are aware of other advice services for small businesses that assist with dispute resolution, have you used them? If yes, please describe your experience and whether it was positive or negative. If no, why did you decide not to use the advice service?

There are private dispute resolution services available such as local mediation companies or bodies such as the Civil Mediation Council (CMC) who can assist.

These services range in price, ACCA believes that ADR should be conducted by private sector via suitable qualified people, with the commissioner ensuring prices are affordable for SMEs.

**Question 14:** Would you consider using a mediation service to support you in settling a dispute with another business?

There is a lack of awareness of mediation among the general public and small businesses and the process is met with certain scepticism. If people were aware of what can be achieved and the high success rates (60-90%) in mediation then it would be used a lot more, and to great effect. For the Small Business Conciliation service to be successful it will need to promote its services widely and coherently.

**Question 15:** Are there any barriers that would prevent you from using a mediation service?
ACCA believes the barriers are lack of awareness, lack of understanding of the process or outcomes and cost.

**Question 16:** Do you agree that the Small Business Commissioner should offer mediation (whether in-house or via third party)

ACCA believes the government should promote and issue guidance and have effective signposting, particularly targeted at SMEs. The commissioner should be able to make contact with organisations where large numbers of issues have been highlighted and investigate if necessary. The private sector/trusted individuals should provide ADR awareness and services business to business.

It is clear that the process needs to be affordable, clear and with an understood outcome for it to be successful in helping UK business.

**Question 17:** Do you agree that the Small Business Commissioner should be able to adopt either both of the measures set out above to encourage meaningful participation in mediation?

**Do you agree that the Small Business Commissioner should be able to adopt either both of the measures set out above to encourage meaningful participation in mediation?**

ACCA believes publishing guidance highlighting good practice in dispute resolution is key to raising awareness of what is available to small businesses and will encourage participation in the processes. This is fundamental to the success of the commissioner and the scheme itself.

**Question 18:** Are there any measures that you think should not be used or others that we have missed? Please explain your reasoning.

ACCA believes that central to the success of the Commissioner will be the involvement of large business and an acceptance that parties should not be forced into mediation. If big business ‘buy in’ to the idea small businesses will be much more likely to enter the process. It should also be noted that one of the key principles of the process is that it must be entered into voluntarily by both parties; forcing people into the process will undermine and devalue the process. The measures outlined in Q17 will encourage, rather than force participation and the principle will be upheld.

In general a widening of the role of the Small Business Commissioner should be considered. The recourse and potential that ADR will have for small businesses should not be underestimated. Involvement of ADR at very early stages of disputes can have dramatic consequences on any outcome. The cost saving potential to both businesses, consumers, government and the legal system are huge. The more access to ADR and dispute resolution mechanisms the better.
Question 19: Do you agree with the framework set out above for:

a. Looking at individual complaints?

b. Making recommendations including the factors to be taken into account? What factors do you think should be considered by a Commissioner in deciding if the behaviour of a business has been fair and reasonable?

c. Publishing information about specific findings?

d. Producing annual reports?

If the Commissioner aims to provide a full ADR service than on the whole the framework is acceptable:

A) The commissioner should not, under any circumstances, produce a report recommending actions to either party. These can be discussed with the parties but should not be reported. It is not the job of the commissioner to adjudicate and any report that he produces will be open to scrutiny by the court if the dispute is taken further. If the findings of the report are deemed inaccurate by the courts then the whole process and position will be undermined.

If the position of the commissioner is one of neutrality then any requirement to produce a report would force them to become evaluative of the party’s positions and compromise neutrality.

Any reporting function should be reserved until any outcome; either successful or unsuccessful has been achieved.

A) The commissioner should apply the factors that decide reasonableness should a dispute have to be decided in a civil court, ie; on the balance of probability (more likely than not). The ‘reasonable man’ test should also be applied when making any decision.

B) Caution should be used when publishing information about specific findings. It is easy to take any findings out of context and has the potential to damage innocent parties. Confidentiality is another of the key characteristics of ADR a processes and differentiates it from traditional mechanisms. Many parties will only engage once they are confident that this confidentiality is absolute, this level of confidentiality enables a skilled ADR practitioner to come to resolutions that would not be available through any other forum. The publishing of specific
‘offending’ companies taints the process with a ‘name and shame’ culture and cannot uphold the principle of neutrality that is trying to be achieved.

The proposal to name an offending company while affording anonymity to the complainant is concerning, and cannot be reconciled with neutrality.

C) The intention of publishing annual reports and findings must be anonymised; this step will uphold the principles of ADR processes and meet the intention of driving up standards.

**Question 20:** Comments on this outline of costs and benefits are welcome. For example are there any additional costs or benefits that you identify being associated with the establishment of the service? Please provide any analysis you may have to inform our costs and benefits assessment.

The costs outline of the service is sufficient at the present time. The actual cost of conflict and disputes is difficult to accurately quantify. The budget for the service and the Commissioner should remain flexible. The start-up costs are minimal but it is important that the Commissioner has the required skills and expertise to deal with the issues that they are likely to face.

The creation of the role is by no means guaranteed to generate any improvements and if handled badly and implemented poorly may serve simply to leave SMEs disillusioned and discouraged about the genuine commitment of BIS and government to improving the UK regulatory environment.

Those businesses interacting with the Commissioner will invest time in the matter and this must be considered by the Commissioner when advising what the outcome will be.