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10 April 2015

Ms Anne Scott
Principal Adviser
Small Business Ombudsman & Procurement Unit
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent PARKES ACT 2600

By email: Anne.scott@treasury.gov.au
small.business@treasury.gov.au

Dear Ms Scott,

SMALL BUSINESS & FAMILY ENTERPRISE OMBUDSMAN BILL – EXPOSURE DRAFT

The Australian Finance Conference (AFC), a national financier association, appreciates the opportunity to provide feedback on the exposure draft of the Australian Small Business and Family Enterprise Ombudsman Bill [ASBFEO Bill] and apologises for the slight delay in response.

Background

The AFC membership includes a range of credit providers, vendor and general financiers, receivables managers and the three principal Australian business and consumer credit reporting entities. AFC Members' operations cover the full range of lending in both the consumer and commercial markets. For those that provide commercial finance, a significant component of their customer-base is "small business". Small business finance is also of particular interest for Members of our associated bodies that focus on providing finance in the commercial market; the Australian Equipment Lessors Association (AELA), the Debtor and Invoice Financing Association (DIFA) and the Australian Fleet Lessors Association (AFLA). Membership lists for AFC and its affiliated associations are attached. As noted in our earlier submission on the discussion paper, depending on how "small business" is defined, some of our Members (in addition to the AFC) may also fall into this category in their own right. As a consequence, in framing our comments we have attempted to consider the Government's ASBFEO Bill from the perspective both of a small business customer of one of our Members and as a Member that is a small business.

General Comment

In principle, AFC supports the morphing of the Australian Small Business Commissioner into an entity able to support and champion the interests of entities appropriately defined as a "small business" to include family enterprises.

An essential function, if not the critical function, for the ASBFEO must be that of educator and information-provision facilitator for business – regardless of whether it is a "small business" or otherwise. Through educating and informing business of their regulatory and contractual responsibilities, the ASBFEO can play a key role in preventing or minimising escalation of B-2-B queries. Education including a means for B-2-B communications to be open and effective including increasing awareness of internal dispute resolution mechanisms that are readily available in each of our Members' organisations and encouraging use of that facility as the primary means of resolving concerns.

Educating business to enhance understanding of the obligations that a contractual commitment brings with it together with the financial skills necessary to ensure on-going success and profitability of a business so that it is able to trade through varying economic conditions is equally paramount for the SBFEO. In this way, other components of the role become far less relevant. In particular, in our view by educating and informing both potential complainant businesses and respondent businesses, the SBFEO is able to minimise the risk of a customer query dealt with inappropriately at first interface with the other contractual business party to escalate into a dispute between two parties that become entrenched in positions largely based on lack of understanding often inflamed by lack of communication and requiring an independent third party to intervene to remove the intransigence and re-open communication flows.

Given its key responsibility is advocacy and assistance for small business, we suggest a title of “Ombudsman” appears to be conflicting and should be re-considered.

Key Issues

On a more specific level there are two key areas of concern AFC has identified with the draft Bill.

1. Definition of “Small Business” Too Broad

The proposed definition appears to capture an extremely broad range of entities than those that would traditionally or in practice be understood to be the “mum and dad-type” small business akin to a consumer that we understand have been identified by the Government as warranting some additional protection. In our view, defining small business by full time employees alone (regardless of whether 100 or 20) raises problems that a similar definition in other legislation (eg the ASIC Act) and jurisdictional settings (eg for the external dispute resolution schemes in our sector; namely the Financial Ombudsman Service [FOS] and Credit & Investments Ombudsman [CIO]) have raised, and continue to raise.

As mentioned in our earlier submission, these problems have included questions around the point in time at which an assessment of whether the entity has the requisite number of employees and is a “small business”. For example, on start up an entity may employ less than the relevant number of FTEs, but a few years later, its ability to run at profit and grow, has enable it to take on additional FTEs that would see if fall outside the definition of a “small business”. Our Member may have had first contact with the entity at start up and at that time it would have met the test of a “small business” as it had the requisite FTEs. However, at the point that the entity may seek to complain about our Member’s lending activities to the EDRS the additional FTEs sees it fall outside a definition based on FTEs, if the entity’s attributes were assessed against the test at that time.

It is also unclear whether the proposed triggers include an assessment of both number of FTEs and annual turnover or whether these are independent definitional triggers.

In our view a comprehensive definition by turnover, employees and gross assets etc. (with a statement as to this prima facie evidence) and an exclusion of subsidiaries of companies that are not small business is what is required.

2. EDRS: Interplay between the ASBFEO + FOS or CIO

We had understood that the ASBFEO was intended to act as a “conciierge” and act to direct a small business to existing EDRS for complaints relating to market segments, including the financial services sector (eg FOS or CIO). For our sector, this was critical to minimise small business customers “forum-shopping” and pursuing vexatious or frivolous complaints through a range of available EDRS, including industry-specific ones and the EDRS jurisdiction of the

ASBFEO, principally to delay our Members pursuing appropriate and prudent enforcement action rather than on any legitimate and well-founded basis of complaint.

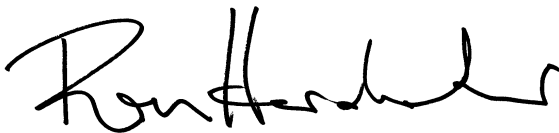
We are concerned that the proposed broad definition of “small business” together with lack of clarity in the Bill around how the interface between the ASBFEO EDRS function and that of the financial services EDRS for complaints relating to financial services sector small business customers are to be handled. In the absence of EDRS jurisdictional clarity there is potential for confusion by small business as to where to go and duplication of efforts and roles with other EDR Schemes.

We would be happy to explore this further with the Government through the Minister for Small Business or your Department. Please feel free to contact me via email through ron@afc.asn.au or our Corporate Lawyer, Helen Gordon, helen@afc.asn.au or both by phone through the AFC Office 02 9231 5877.

We also look forward to continuing to work with the Government to provide input on steps to take forward decisions it makes in relation to the ASBFEO role.

Kind regards.

Yours truly,



Ron Hardaker
Executive Director

Attachments:
List of Members; AFC, AELA, AFLA , DIFA



AFC MEMBER COMPANIES

Alleasing	Nissan Financial Services
AlliedCredit	Once Australia t/as My Buy
American Express	PACCAR Financial
ANZ t/as Esanda	Pepper Australia Pty Ltd
Automotive Financial Services	RABO Equipment Finance
Bank of Melbourne	RAC Finance
Bank of Queensland	RACV Finance
BMW Australia Finance	Ricoh Finance
Branded Financial Services	Service Finance Corporation
Capital Finance Australia	Sharp Finance
Caterpillar Financial Australia	SME Commercial Finance
Classic Funding Group	St. George Bank
CNH Industrial	Suncorp
Commonwealth Bank of Australia	SunPower
Credit Corp Group	Suttons Motors Finance
De Lage Landen	Team Leasing
Dun & Bradstreet	TL Rentals
Experian Asia Pacific	Thorn/Radio Rentals
FlexFleet	Toyota Financial Services
FlexiGroup	Veda
GE Capital	Volkswagen Financial Services
Genworth	Volvo Finance
HP Financial Services	Westlawn Finance
HSBC Bank	Westpac
Iden Leasing Services	Wex Australia
Indigenous Business Australia	Wingate Consumer Finance
International Acceptance	Wide Bay Australia
John Deere Financial	Yamaha Finance
Kubota Australia Finance	
Komatsu Corporate Finance	<u>Professional Associate Members:</u>
Leasewise Australia	CHP Consulting
Liberty Financial	Clayton Utz
Lombard Finance	Dibbs Barker
Macquarie Equipment Rentals	Henry Davis York
Macquarie Leasing	NetSol Technologies
Max Recovery Australia	White Clarke
Mercedes-Benz Financial Services	
MetroFinance	



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AELA MEMBER COMPANIES

255 Finance	John Deere Financial
Alleasing Group	Kemp Strang
ANZ Asset Finance	Keypoint Law
Ashurst Australia	King & Wood Mallesons
Australian Structured Finance	Komatsu Corporate Finance
Bendigo Bank Leasing Division	KPMG
BMW Australia	Macpherson + Kelley Lawyers
BOQ Finance (Aust)	Macquarie Leasing
Bynx Australia	Marubeni Finance (Oceania)
Camnet	Mercedes-Benz Financial Services
Canon Finance Australia	National Australia Bank
Caterpillar Financial Australia	NetSol Technologies
Catch-e	Norton Rose Fulbright Australia
CHP Consulting	PACCAR Financial
Cisco Systems Capital (Australia)	Pepper Australia
Classic Funding Group	Realtime Computing
Clayton Utz	Ricoh Finance
CNH Industrial Capital Australia	Service Finance
Colin Biggers & Paisley	SG Equipment Finance
Commercial Asset Finance Brokers Assoc.	Sharp Finance
Commonwealth Bank of Australia	Sandvik Credit
De Lage Landen	Sofico Services Australia
DibbsBarker	Spectra Financial Services
FlexiGroup	St. George Bank
Fuji Xerox (Finance) Australia	Suncorp
GE Capital	SunGard Asia Pacific
Henry Davis York	Thorn/RR Australia
Herbert Smith Freehills	Toyota Finance Australia
Holman Webb Lawyers	Traction Group
HP Financial Services	Upstream Print Solutions
IBM Global Financing	Volvo Finance
Insyston	Westpac
International Decision Systems	White Clarke Asia Pacific
Investec Bank (Australia)	Xeberg

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AFLA MEMBER COMPANIES

Alphabet Fleet Management

Custom Fleet

Fleetcare

FleetPartners

LeasePlan Australia

McMillan Shakespeare

NLC

ORIX Australia

QFleet

Selectus

Sgfleet

smartleasing

StateFleet

Summit Auto Lease Australia

Toyota Fleet Management

DIFA MEMBERS

**180 Group
Bank of Queensland
Bendigo Debtor Finance
Bibby Financial Services
Cash Resources Australia
Cashflow Finance Australia
GE Capital
HSBC Bank Australia
Key Factors
National Australia Bank
Scottish Pacific Debtor Finance
St. George Bank
Suncorp Working Capital Solutions
Westpac Banking Corporation**

Associate Members

**Cashflow Funding Limited
Lock Finance NZ
Pacific Invoice Finance NZ
Scottish Pacific Debtor Finance NZ**

Affiliate Members

**DLA Piper Australia
FTI Consulting
GlobalX Information
Hall Chadwick
Hermes Data Systems
HPD Software Asia Pacific
Lowe Lippmann
Piper Alderman
Polczynski Lawyers
Trace Personnel
Gregory Clayton, Barrister & Solicitor**

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