



Law Council
OF AUSTRALIA

Business Law Section

Manager
Small Business Ombudsman and Programmes Unit
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600
By email: small.business@treasury.com.au

10 April 2015

Dear Sir or Madam,

Australian Small Business and Family Enterprise Ombudsman Bill 2015

Introduction

The Law Council of Australia, is the peak national body representing the legal profession in Australia.

The Small and Medium Enterprise Business Law Committee of the Business Law Section of the Law Council of Australia (SME Committee) makes this submission in response to the *Australian Small Business and Family Enterprise Ombudsman Bill 2015*, released by The Treasury.

The SME Committee has as its primary focus the consideration of legal issues affecting small businesses and medium enterprises in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SME's.

Please also note that our submissions may differ from those made by other Committees of the Law Council. This is because the SME Committee seeks to represent and reflect the interests of SME's.

Key functions

The SME Committee is a strong supporter of the Australian Small Business and Family Enterprise Ombudsman (Ombudsman). The SME Committee outlined its support for the creation of the Ombudsman in its earlier submission to the Treasury in response to "The Small Business and Family Enterprise Ombudsman" Discussion Paper released in April 2014.

The SME Committee understands from the Explanatory Memorandum that the key functions of the Ombudsman will be to act as a:

- Commonwealth-wide advocate for small business
- Concierge for dispute resolution, including offering its own dispute resolution service and
- Contributor to small business-friendly Commonwealth laws and regulations.

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The SME Committee agrees that these are the appropriate key functions for the Ombudsman. We believe that there is an urgent need for a strong, independent and dedicated advocate for small business interests at the Commonwealth level.

Definition of Small Business

The SME notes the meaning of “small business” in the Bill, as follows:

- (1) A business is a **small business** at a particular time in a financial year (the **current year**) if:
 - (a) it has fewer than 100 employees at that time; or
 - (b) either:
 - (i) its revenue for the previous financial year is \$5,000,000 or less; or
 - (ii) if there was no time in the previous financial year when the business was carried on—its revenue for the current year is \$5,000,000 or less.

The SME Committee believes that this definition of small business is appropriate. This definition will include those small businesses with high numbers of casual employees, such as hotels and clubs, which would be excluded by a lower employee threshold.

Advocacy function

We note from the Explanatory Memorandum that the Ombudsman will have the following advocacy function:

The Ombudsman will be an independent advocate who will act as a conduit for, and representative of, issues that small businesses are facing at the national level. In practice, this will mean that the Ombudsman has the power to conduct inquiries into the effect of relevant laws, policies and practices on small businesses, and how these might be improved.

The SME Committee agrees that this is an important role for the Ombudsman to fulfill. Indeed, this is the particular role which our SME Committee has been seeking to fulfill since its establishment – namely to explain to government the practical effect which particular laws will have on the small business sector.

A good example of the SME Committee’s recent efforts relate to the proposed extension of Unfair Contract Terms legislation to small business transactions. In its submissions to The Treasury, the SME Committee sought to explain the significant benefits which would flow to small business from this particular legislative change.

However, the SME Committee notes that the scope of the Ombudsman’s advocacy function is limited to those areas which the Commonwealth Government has jurisdiction under the Australian Constitution. The SME Committee believes it would be preferable for the Ombudsman to have broader jurisdiction, so that there are no gaps in the level of protection provided to small businesses. Of particular concern are small businesses which operate within states which do not currently have a Small Business Commissioner.

Accordingly, the SME Committee believes that it would be more appropriate for the Commonwealth Government to seek to cover the field in relation to the advocacy function. The SME Committee understands that this may require the referral of relevant powers to the Commonwealth by the States.

The SME Committee believes that it is important for the Ombudsman to have a discretion about the particular issues about which they wish to initiate research and inquiries. The existence of this discretion will clearly enhance the independence of the Ombudsman.

Inquiries under the Ombudsman's initiative

The SME Committee notes that the Bill provides for the Ombudsman to have a range of coercive powers to force a person to provide information or documents. We believe that it will be necessary for the Ombudsman to have access to such coercive powers if its role is to be effective.

Unfortunately, from our experience both large business and government departments are often very reluctant to provide information and documents to small businesses about their complaints, preferring instead to invoke privacy, confidentiality or one of the myriad defences contained in Freedom of Information (FOI) legislation.

Indeed, a SME Committee member is aware of one instance a few years ago of a Commonwealth Government agency invoking a wide range of FOI defences in relation to small business request for information, which resulted in approximately 97% of the requested documents being withheld.

The SME Committee also notes that the Ombudsman will be required to prepare regular reports for the Minister for Small Business. However, the SME Committee notes that under section 41(1) of the Bill, while the Minister "may" publish the Ombudsman's reports, the Minister is under no legislative obligation to publish such reports.

The SME Committee does not believe that it is appropriate in terms of transparency or independence for the Minister to have a discretion not to publish a report prepared by the Ombudsman. In our view, it would be more appropriate for the legislation to place an obligation on the Minister to publish all Ombudsman reports within a reasonable period of time.

The SME Committee believes that it is appropriate, as set out in the Bill, for all Ombudsman reports prepared at the Minister's direction to be tabled in Parliament. In this way, the Ombudsman's reports will be made public, thus enhancing the transparency and independence of the Ombudsman's role.

Contributing to small business-friendly laws and regulations

The SME Committee believes that this particular function is one of the Ombudsman's most important roles. It is important for government to gain a proper understanding of the impact of legislation on the small business sector before it passes the legislation. As stated above, this Committee has been seeking to assist the government over the last few years in understanding the impacts that various laws will have on the small business sector.

The SME Committee believes that all governments need access to an independent advocate who can carefully weigh up contradictory arguments and provide accurate and balanced advice on the true impacts and benefits of particular legislation on the small business sector.

Dispute resolution function

The SME Committee also agrees that the Ombudsman must have a specific legislative role in relation to the resolution of disputes, rather than being limited solely to the making of referrals. In our experience, existing Small Business Commissioners have been very effective in the past in resolving disputes between small and large businesses.

The SME Committee notes that the Ombudsman's dispute resolution function is limited to "relevant actions" which are defined as actions which affect or may affect small business, taken by:

- Commonwealth and Territory agencies;
- constitutional corporations;
- any entity engaged in international trade or commerce;
- any entity engaged in trade or commerce among the States, within a Territory, between Territories or between a State and a Territory;
- any entity in relation to insurance, banking, telecommunications, copyright, patents, designs or trademarks; and
- any entity that is operated by those living in or located in a Territory.

While the SME Committee accepts that the above areas encompass a wide range of sectors of the economy, particular the category of "constitutional corporations", we are concerned that small businesses in jurisdictions without a Small Business Commissioner may have access to fewer protections, particularly in their dealings with State Government businesses.

One option to ensure that State based businesses and government business/departments are subject to the Ombudsman's dispute resolution jurisdiction would be to extend the definition of "relevant actions" to include:

- any entity engaged in trade or commerce within the meaning of the *Competition and Consumer Act 2010*.

While the SME Committee supports the idea that the Ombudsman should have a broad discretion to decide which complaints it will attempt to resolve, it also believes that complaints from trade associations and other small business associations should be handled by the Ombudsman in all but exceptional circumstances. The reason for our view is that small business complaints which have been referred to the Ombudsman by a trade association and small business association are likely to raise more serious and wide-ranging issues.

Accordingly, the SME Committee believes that the bill should be amended to state that the Ombudsman has an obligation to deal with all complaints made to it by trade associations and small business associations (eg COSBOA), unless the trade association or small business association agrees that a referral is appropriate.

The SME Committee is also concerned about the implications of section 67 of the Bill which suggests that the Ombudsman cannot be asked to resolve a dispute where it involves an action by any Minister or where the matter is before the Courts.

The SME Committee believes that the first exclusion is too broad given the definition of “action” under section 7 of the Bill:

A reference to the taking of **action** includes a reference to:

- (a) an activity or series of activities; and
- (b) a project, development or undertaking; and
- (c) making a decision or recommendation; and
- (d) formulating a proposal; and
- (e) requiring that communications with an entity be in a particular manner or form; and
- (f) an alteration of any of the things, including decisions, proposals and requirements, mentioned in paragraphs (a) to (e); and
- (g) failure or refusal to do any of the things mentioned in paragraphs (a) to (f).

The SME Committee is also concerned that an obvious implication of the second exclusion is that a party may decide to expedite legal proceedings against a small business in order to prevent the Ombudsman from getting involved in the dispute.

Referrals

The SME Committee believes that the Ombudsman should seek to refer most small business disputes to other agencies, rather than seeking to resolve those disputes itself. In this regard, the SME Committee agrees that the mechanism for making such referrals, as set out in the Bill, is appropriate.

However, the SME Committee believes that the legislation should provide for the Ombudsman to enter into Memoranda of Understanding (MOU) with relevant regulators to formalise the referral process. These MOU’s should include a timeframe for the regulator to assess and respond to the referral and also an obligation on the regulator to provide reasons for any decision it makes not to act on the referral. The SME is concerned that unless there are MOU’s between the Ombudsman and regulators along these lines, there is a risk that referrals will not be acted on by the regulator in a timely manner or at all.

In particular, it is important that the Ombudsman be permitted to share all information which they have obtained about the small business dispute with the other agency. This provision will ensure that valuable time is not lost when a referral is made, as the other agency will not be forced to “start from scratch”.

ADR mechanisms offered through the Ombudsman

The SME Committee believes it is appropriate for the Ombudsman to maintain a panel of specialist ADR providers which small business can access. It is important that the process of appointment to this panel be transparent and that mediators have genuine business experience.

Furthermore, steps need to be taken to ensure that the costs of mediation are kept at reasonable levels.

A number of SME Committee members are aware of other ADR processes which started out as an informal and low cost option, but which have over time become extremely formal and costly. The SME Committee believes that practical steps have to be taken to prevent the Ombudsman's ADR panel from heading in this direction.

Thought should be given to requiring the Ombudsman to seek nominations from trade associations and small and big business associations of ADR practitioners who they believe would be suitable to join the panel given their expertise and background. In this way, the Ombudsman will be able to ensure that the panel consists of ADR practitioners who have a deep and practical understanding of business.

Not providing assistance

We believe that it is appropriate for the Ombudsman to provide small businesses with reasons why the Ombudsman has decided not to provide assistance. However, we are concerned that this may create a significant administrative burden for the Ombudsman if every decision must be in writing.

In our view, it may be appropriate for the Ombudsman to be permitted to convey their reasons for not providing assistance orally, but to give the small business a right to request written reasons within a particular period of time, if they wish.

In our experience, while most small business want to know why a government department has decided not to pursue their complaint, they often do not require that these reasons be put into writing.

Final comments

The SME Committee believes that it is important that the Australian Small Business and Family Enterprise Ombudsman not duplicate the services already being provided by state based Small Business Commissioners.

Having said this, the SME Committee is concerned that every state does not have a Small Business Commissioner. Accordingly, the SME Committee believes it would be appropriate for the Australian Small Business and Family Enterprise Ombudsman to have a broader, over-arching jurisdiction in relation to advocacy and disputes. We are concerned that unless such an approach is taken some small businesses may fall between the gaps and miss out on valuable protections, particularly in their dealings with State Government businesses and departments.

Finally, we wish to reiterate our strong support for the Australian Small Business and Family Enterprise Ombudsman. We believe that it is vitally important for the small business sector that the Commonwealth Government establish the Australian Small Business and Family Enterprise Ombudsman, with the various functions and powers as set out in the Bill, as soon as possible.

Further discussion

The SME Committee would be happy to discuss any aspect of this submission.

Please contact Coralie Kenny, the Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John Keeves' in a stylized, cursive script. The signature is written in a fluid, connected style with a long horizontal stroke extending to the right.

John Keeves, Chairman
Business Law Section