7 April 2015

Manager
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Small Business, Competition and Consumer Policy
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Dear Sir/Madam

Australian Small Business and Family Enterprise Ombudsman Bill 2015

Thank you for the opportunity to comment on the Exposure Draft of the *Australian Small Business and Family Enterprise Bill 2015* ("the Bill").

1. Position title

We consider the use of the term 'Ombudsman' in the title 'Australian Small Business and Family Enterprise Ombudsman' ("the Ombudsman") is misleading and is likely to lead to public confusion. Very few of the functions of the position, outlined in sections 13, 14 and 15 of the Bill, relate to what might be described as ombudsman-type functions. To outsiders (who may make up a significant proportion of the position's 'clients'), it will appear as though the position is part of the apparatus of the Commonwealth Ombudsman, which will be misleading. The term 'Small Business Commissioner' is now widely known and is in use in the majority of states. We recommend that the proposed position be renamed as the 'Australian Small Business and Family Enterprise Commissioner' in order to avoid confusion.

Incidentally we can find no provision in the Bill which relates to a 'family enterprise' as distinct from a 'small business'. Given that under section 5 "business" includes "an enterprise", and in section 6 a "family enterprise" has to be a "small business", there appears to be no reason for including a definition of 'family enterprise' in the Bill. We are therefore puzzled why the position spells out 'family enterprise' in the title. There seems no reason why the position should not be named the 'Australian Small Business Ombudsman' or, if our argument is accepted, the 'Australian Small Business Commissioner'.

2. Meaning of 'small business' (section 5)

We disagree with the definition of 'small business' in section 5 and regard it as excessive. The Explanatory Materials notes (p.2) that, under the Bill's definition, somewhere between 97.3% and 99.8% of businesses in Australia will be covered by the Bill. It defies logic to suggest that a business with 99 employees could be regarded as 'small'. This will result in the resources of the office being dissipated because they could be spread over many businesses that obviously do not require such assistance or attention.

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The Consultation Paper *'Extending Unfair Contract Term Protections To Small Businesses'*, released in May 2014, noted the Australian Bureau of Statistics defines a 'small business' as one which has 19 or fewer employees. It therefore makes no sense for the Bill to define a small business as one which has a workforce which is five times larger than that nominated by the ABS for a 'small business'. Similarly the same Consultation Paper notes that the Australian Tax Office defines a small business as one which has an annual turnover of less than $2 million. It also makes no sense for the Bill to define a small business as one which has an annual turnover which is 2½ times that nominated by the ATO.

We are also concerned that if the Bill proceeds with the current definition of 'small business' there will be considerable pressure from small business organisations to also include this definition in the relevant provisions of the *Competition and Consumer Act* when the unfair contract terms protections are extended to small businesses. This will massively increase the amount of business red tape which will accompany that new law.

We urge the adoption of a more sensible definition of 'small business'. In line with our comments above, we recommend that the reference to '100' in section 5(1)(a) by replaced by '20' and the reference to '$5,000,000' in section(1)(b)(i) and (1)(b)(ii) be replaced by '$2,000,000'.

We note that, if this recommendation is adopted, 97.3% of businesses will still be covered by the Bill.

If our recommendation is not accepted, we recommend that the word "or" in section 5(1)(a) be replaced by "and" so that a business, in order to qualify as a 'small business' for the purposes of the Bill, has to meet both limbs of section 5(1).

3. Retail tenancy dispute resolution

We are concerned about the potential for overlap between the Ombudsman's dispute resolution function and the dispute resolution mechanisms already established under retail tenancy legislation in every State and Territory. Although the Bill anticipates the potential for overlap with the responsibilities of other bodies, including state agencies – and is not intended to exclude or limit the operation of any state or territory law (s.79) – it is inevitable that overlaps will occur. This is despite section 69 which states the Ombudsman must not give assistance if he/she reasonably believes the request could have been made of an agency of a State or Territory. At the very least, unnecessary time and administration will be involved in the Ombudsman being required to provide written reasons for his/her decision not to provide assistance under section 67(3).

We recommend that the Bill should exclude from the dispute resolution functions of the Ombudsman any dispute which relates to a lease which is regulated by a state or territory retail tenancy law, even if such a dispute might be characterised as a dispute which extends beyond the boundaries of a state or territory. (In our experience retail tenancy disputes which extend across borders are extremely rare.)

We have recently provided to the Senate Economics References Committee, which conducted an inquiry into the 'need for a national approach to retail leasing arrangements', a summary of the dispute resolution processes which currently operate in each State and Territory under the relevant retail tenancy legislation. We have **attached** the relevant extract from our submission.

As we noted in that submission: ". . . *every jurisdiction provides parties the opportunity to undertake alternative dispute resolution prior to seeking a decision from a tribunal or a court. Our members advise that these processes work relatively well and . . . we have no concern about jurisdictions mandating that parties attempt to mediate a dispute prior to a matter being progressed to a tribunal or court.*"

A complete exclusion for disputes arising under a regulated retail tenancy lease would be the most efficient means of ensuring that unnecessary duplication of resources does not occur and unnecessary business and government red tape (including that imposed by section 67(3)) are avoided.

An amendment should be made to section 79 along the following lines:

> *"(2) The Ombudsman is prohibited from responding to a request for assistance under section 15 relating to a dispute which arises under a lease which is regulated by a state or territory retail tenancy law".*

If considered necessary a definition of 'retail tenancy law' could be included in section 4 by reference to each state and territory retail tenancy law. (These are mentioned in the **attachment** to this submission.)

4. Assistance in a dispute

Another reason for adopting our recommendation in section 3 of this submission is that the Ombudsman's powers to assist in disputes (in Division 3) appear to be very limited and are unlikely to provide disputing parties with a satisfactory outcome. First, the Ombudsman and his/her office has no power to conduct alternative dispute resolution (section 73) and can only "recommend" (section 71) alternative dispute resolution processes (and, if the parties refuse, the Ombudsman's only recourse is to "publicise that fact"). Second, the Ombudsman does not appear to have the power to recommend a person to conduct alternative dispute resolution but only to publish a list of persons qualified to conduct alternative dispute resolution and the mediator "must be chosen by the parties to the dispute" (section 73). This seems unrealistic. If the parties are in dispute it is unlikely that they will agree on each other's recommendation for a mediator. We see no reason why the Ombudsman should not have the power to recommend a mediator to the parties.

5. Inquiries on the Ombudsman's initiative

In contrast to the lack of powers given to the Ombudsman in relation to dispute resolution, the Bill gives the Ombudsman extraordinarily wide powers to conduct inquiries on his/her own initiative (as well as inquiries on matters referred by the Minister). This includes powers to demand the production of information and documents, and includes penalty provisions if these are refused. We see no justification for enabling the Ombudsman to embark on 'fishing expeditions' on his/her initiative. This is particularly the case since the Ombudsman, given the position is established as an advocate for small business, can never be regarded as a neutral or objective body to be conducting such investigations. In our view the Ombudsman's powers to conduct inquiries on his/her initiative in section 36 should be limited to "the effects of relevant legislation on small business".

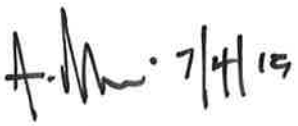
The Explanatory Materials note that, in relation to dispute settlement, "concerns regarding unfair market practices are likely to be referred to the ACCC which monitors compliance with Australian competition, fair trading and consumer protection laws." It therefore makes little sense for the Ombudsman, on his/her own initiative, to have the power to investigate unfair market practices when the Bill envisages that such an inquiry should be conducted by the ACCC. Similarly there will be occasions when, for example, it is more appropriate for the Productivity Commission to conduct such an inquiry.

We believe that inquiries in relation to "policies and practices" should be conducted only if referred by the Minister under section 4. This would enable the Minister (and the Government), who have an ability to bring a whole-of-government perspective, to decide whether such an inquiry should be held and decide whether the inquiry should be conducted by a more appropriate body, such as the ACCC or the Productivity Commission.

We therefore recommend that the words "policies and practices" be deleted from section 36. (These are already included in section 42 so no other amendment is needed.)

We are happy to elaborate further on any aspect of this submission.

Yours sincerely,



Angus Nardi
Executive Director

(b) Affordable, effective and timely dispute resolution processes

Each jurisdiction provides for relatively affordable, effective and timely dispute resolution processes that, typically, seek to have disputes resolved informally or mediated between parties before it can proceed to the relevant tribunal or court for deliberation. Indeed, in its 2008 report following its inquiry into The Market for Retail Tenancy Leases in Australia, the Productivity Commission summarised that "as a result of developments over the last two decades, retail tenants and landlords now have access to low-cost alternative arrangements for dispute resolution in each jurisdiction[7]". The Productivity Commission goes onto say "this is intended to be of particular value to small retail tenants and small landlords[8]".

In this regard, it is not clear what aspect of the existing dispute resolution processes the Senate Committee is seeking to investigate. Indeed, in many jurisdictions there are dedicated statutory officials, whose positions are enshrined in legislation separate to the prevailing retail lease legislation, charged with providing support to small businesses, including dispute resolution assistance.

For the benefit of the Senate Committee, following is a brief summary of the dispute resolution processes which currently operate in each jurisdiction. In line with the reference heading, we have, where readily available, provided an indication of the cost of the application fee and/or mediation process to provide an indication of the affordability of the process.

- In **NSW**, the *Retail Leases Act* outlines that a retail tenancy dispute may not be the subject of proceedings before any court until the Registrar who, in this case, is the NSW Small Business Commissioner, certifies in writing that the mediation was unsuccessful. There is no application fee for mediation and it costs $152 per hour (shared equally between parties). If unsuccessful, a dispute claim can be lodged with the NSW Civil and Administrative Tribunal (NCAT, formerly the Retail Leases Division of the Administrative Decisions Tribunal) for decision. The NCAT can also hear unconscionable conduct claims under the provisions of the *Retail Leases Act*.

- In **Queensland**, the *Retail Shop Leases Act* outlines that a party to a dispute is to lodge a 'notice of dispute' with the Queensland Civil and Administrative Tribunal, following which a mediation conference can be held. Parties cannot be compelled to attend mediation (although, in our submission to the current review of the Act, we have recommended that disputes should not be referred onwards until a mediator has certified that the mediation process has failed, or is unlikely to be resolved as per the process in NSW and Vic). If mediation did not take place or was unsuccessful, the mediator will refer the dispute to the Queensland Civil and Administrative Tribunal (QCAT). The fee for lodging a dispute notice is $295. The QCAT can also hear unconscionable conduct claims under the provisions of the *Retail Shop Leases Act*.

- In **Victoria**, the *Retail Leases Act* outlines that the Small Business Commissioner is to make arrangements for mediation (or alternative dispute resolution) of retail tenancy disputes. A dispute can only be referred to the Victorian Civil and Administrative Tribunal (VCAT) if the Small Business Commissioner has confirmed in writing that the dispute resolution has failed, or that the matter is unlikely to be resolved. The cost of mediation is $195 per party, per mediation session. (The website of the Victorian Small Business Commissioner notes that they subsidise the majority of costs and it is only "if the stakes are high" that a greater contribution may be sought from the parties[9].) The VCAT can also hear unconscionable conduct claims under the provisions of the *Retail Leases Act*.

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[7] Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia*, No.43, 31 March 2008, p. 80

[8] ibid

[9] We don't know what this reference means.

- In **Western Australia,** *the Commercial Tenancy (Retail Shops) Agreements Act* allows for parties to a lease to refer a 'question' to the State Administrative Tribunal (SAT), but only following the receipt of a certificate from the Western Australian Small Business Commissioner which details that the matter is unlikely to be resolved through alternative dispute resolution, including mediation. Mediation costs $125 per party. The SAT can also hear unconscionable conduct claims under the provisions of the *Commercial Tenancy (Retail Shops) Agreements Act*.

- In **South Australia**, the *Retail and Commercial Leases Act* outlines that a party to a lease can apply to the South Australian Small Business Commissioner to mediate a dispute. A court may also refer a dispute to the Commissioner for mediation. Mediation costs $195 per party per day. Depending on the value of the claim, the Magistrates Court and / or the District Court can also hear retail lease disputes.

- In **Tasmania**, the *Code of Practice for Retail Tenancies* outlines parties to a lease must first attempt to resolve their dispute through direct negotiation. If unsuccessful, the Office of Consumer Affairs can be asked to investigate and negotiate a solution. If still unresolved, a party can refer the matter to a court for decision.

- In the **ACT**, the *Leases (Commercial and Retail) Act* outlines that the Magistrates Court must hold a case meeting and determine whether it is likely the dispute could be resolved before a hearing. The Magistrates Court can refer the matter for other dispute resolution mechanisms, including mediation. The Magistrates Court also hear claims of unconscionable conduct under provisions of the *Leases (Commercial and Retail) Act*.

- In the **NT**, the *Business Tenancies (Fair Dealings) Act* outlines that a party to a retail shop lease can apply to the Commissioner for Business Tenancies for the determination of a retail tenancy claim. Following a conciliation conference, if the Commissioner is satisfied that the dispute is unlikely to be resolved, including if a party did not participate in a conference, the Commissioner may issue a certificate following which time the dispute can proceed to court. A court can also hear unconscionable conduct claims under the provisions of the *Business Tenancies (Fair Dealing) Act*.

As evidenced above, every jurisdiction provides parties the opportunity to undertake alternative dispute resolution prior to seeking a decision from a tribunal or court. Our members advise that these processes work relatively well and, as outlined above with respect to the review of the Queensland retail tenancy legislation, we have no concern about jurisdictions mandating that parties attempt to mediate a dispute prior to a matter being progressed to a tribunal or court.

We note that mediation fees are absorbed into the relevant application fee, subsidised by the mediating party or split equally between by the participating parties. The cost of mediation (several hundred dollars at the maximum) are hardly cost prohibitive in the context of claims which can reach into the hundreds of thousands of dollars (eg. $400,000 in NSW) and, in relevant instances where a small business is seeking mediation with a landlord, including a shopping centre owner, the landlord must equally contribute to the cost of the mediation. It is also important to note that many jurisdictions champion their dispute resolution processes as being 'low-cost'.

With respect to effectiveness of dispute resolution processes, based on a review of various websites and Annual Reports across jurisdictions, we can say that (1) the number of disputes brought forward is extremely small relative to the number of leases on foot across Australia, (2) many disputes are able to be resolved prior to mediation, and (3) the majority of disputes which are mediated are able to be resolved successfully. It is also important to note that the low number of disputes brought forward doesn't reflect dissatisfaction with the process or service, but that the retail tenancy market is functioning well with, by and large, little need for disputes to be resolved with third party assistance.

- The NSW Small Business Commissioner reported that in 2012-13[10] they "managed a high volume of applications for the mediation of disputes", without detailing how many applications were received, nor the number that were progressed to mediation. The Commission's website also notes that "mediation is so successful that about 94% of all matters referred to us for mediation are resolved prior to having a court decide the matter[11]".

- The QCAT reports that in 2012-13[12] there were 130 claims lodged relating to retail shop lease matters, with a 115% clearance rate for the reporting period (presumably having also cleared cases from the previous reporting period). Although not broken down by area of claim, the QCAT also notes that there was a 44% mediation settlement rate in minor civil disputes in the reporting period.

- The Victorian Small Business Commissioner reported that in 2012-13[13] that they received 1,103 applications for dispute resolution related to the *Retail Leases Act*. Of these, only 594 progressed to mediation and the success rate was 80.3%. These numbers are consistent with information provided earlier in the report which details that about 42% of all applications received by the VSBC are resolved prior to mediation[14].

- The Western Australian Small Business Development Corporation reported that, in 2012-13[15], 132 cases were resolved through alternative dispute resolution that related to retail tenancy disputes, noting that 80% of these were "resolved directly, therefore removing the need to the disputing parties to seek a determination through the SAT".

- The South Australian Small Business Commissioner reported[16] that only 27% of formal cases received related to the *Retail and Commercial Leases Act* and that 88% of all formal cases are successfully resolved. Further, they report that 98% of disputes are resolved prior to mediation.

- The Tasmanian Government reported that in 2012-13[17] there was only one complaint received under the *Code of Practice for Retail Tenancies*.

- There is no readily available data from the ACT.

- The Commissioner of Consumer Affairs in the Northern Territory[18] reported that there were only four applications submitted in 2012-13.

The timeliness of dispute resolution would be dictated by the demand on the dispute resolution bodies, such as the various Small Business Commissions and tribunals. It should be noted that the jurisdiction of the courts and tribunals, in particular, extend past the prevailing retail lease legislation, and some Small Business Commissioners also perform dispute resolution functions under other Acts. For example, the Victorian Small Business Commissioner has a role with regard to the *Owner Drivers and Forestry Contractors Act* and the *Farm Debt Mediation Act*. The timeliness of resolution would also depend on whether the matter is resolved prior to mediation, following mediation or if it is necessary to seek resolution at court or a tribunal. Generally speaking, we understand that accessing mediation can take several weeks to a few months, while the mediation session itself should take no longer than a few hours.

[10] NSW Trade and Investment Annual Report 2012-13, p. 83
[11] NSW Small Business Commissioner website, 14 August
[12] QCAT Annual Report 2012-13, p.12-13
[13] Victorian Small Business Commissioner Annual Report 2012-13, p. 17
[14] Victorian Small Business Commissioner Annual Report 2013-14, p. 11
[15] Small Business Development Corporation Annual Report 2012-13, p. 22
[16] South Australian Small Business Commissioner Annual Report 2012-13, p. 12-13
[17] Department of Justice Annual Report 2012-13, p. 61
[18] Annual Report of the Commissioner of Consumer Affairs 2012-13, p. 27