



New South Wales Society of
Labor Lawyers

**Submission to the Senate Standing Committee on
Economics**

Comments on Small Business Commissioner Bill 2013

April 2013

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Submission to the Senate Standing Committee on Economics regarding the Small Business Commissioner Bill 2013

03 April 2013

The New South Wales' Society of Labor Lawyers aims, through scholarship and advocacy, to effect positive and equitable change in the substantive and procedural law, the administration of justice, the legal profession, the provision of legal services, provision of legal aid and legal education.

This submission was approved by the New South Wales' Society of Labor Lawyers' Executive. It is in line with the Society's principles, objectives and values.

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The Secretary
Senate Economics Legislation Committee
PO Box 6100
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CANBERRA ACT 2600

03 April 2013

Dear Senate Standing Committee on Economics

Small Business Commissioner Bill 2013 (the “Bill”)

The Commercial Law Committee of the New South Wales’ Society of Labor Lawyers (the “Society”) refers to the request from the Senate Standing Committee on Economics (the “Standing Committee”) for comments and submission on the Bill. The Society is grateful for the opportunity to prepare a submission. We set out a number of comments on the Bill below.

The Society comprises a range of current and former legal practitioners with experience in various practice areas related to commercial and corporate law, including matters relevant to small business. The Society has also had the benefit of reviewing a range of publicly accessible submissions from interested organisations such as the Law Council of Australia and Queensland Law Society. References herein to sections and subsections are to those of the Bill, unless otherwise indicated.

This submission begins with an endorsement of the intentions of the Bill. It then proceeds to provide commentary and recommendations on each of the first three sections of the Bill. It concludes with some remarks on the introduction of a code of conduct.

Support for the Bill

The Society applauds the purposes and intentions of the Bill in establishing the Office of the Small Business Commissioner as an advocate for and representative of small business. The Society recognises the centrality of small business to ongoing growth and development of Australia’s prosperity. The Society views the promotion and fostering of small business as an important part of developing a more just and equitable society.

Small businesses face a plethora of challenges and difficulties, many of which involve negotiating the complex web of State and Commonwealth regulations and government instrumentalities. To this end, the establishment of a small business advocate who can facilitate dialogue and dispute resolution, as well as provide a centralised port of call for small business, is a welcome reform.

General Comments

Division 1 – Establishment

Small business definition

As indicated in the Law Council of Australia’s submission, the definition of “small business” in section 3, being a “business that has 19 or fewer employees” may be unnecessarily restrictive. A broader, more general, definition is favourable.

Recommendation

The Society recommends that the definition of “small business” contained in the Bill be amended and replaced with a flexible and non-exhaustive definition.

Division 2 – Functions and powers of the Commissioner

Clarity regarding powers, functions and procedures

Section 7 (*Functions and powers of the Commissioner*) sets out in broad terms the various areas in relation to which the Commissioner has functions and powers, including: dispute resolution, reporting, research and publication, sharing information with the ACCC and the ASIC and requiring an individual to attend and give evidence. Subsection 7(f) provides that the Commissioner has “the power to do all things necessary or convenient to be done for or in connection with the performance of these functions”.

Subsection 8(1) provides that, broadly speaking, the dispute resolution functions and powers of the Commissioner can be directed towards three areas:

- (i) dealing with complaints from and ensuring the fair treatment of small businesses in relation to their commercial arrangements with Commonwealth government instrumentalities;
- (ii) the fair treatment of small business in their commercial arrangements with other businesses; and
- (iii) entry into arrangements with the Commissioner’s State or Territory counterparts in relation to matters of national importance.

The exact powers that the Commissioner would have (and the action that the Commissioner may take) are not specified in detail, nor is the Commissioner’s standing in proceedings, matters or tribunals expressly articulated in the Bill. Such ambiguity could give rise to uncertainty and raises a number of questions. For example, could the Commissioner act for and on behalf of small businesses in matters involving government instrumentalities? How would this involvement occur in the context of commercial negotiations and deal-making? Furthermore, as currently drafted, such powers and functions would be largely limited to matters arising from the confines of commercial arrangements or involving fair treatment. The restrictive drafting of this provision could limit the Commissioner’s ability to deal with matters that don’t fall into either category. For example, small businesses may have matters of concern about regulations that don’t strictly arise out of commercial arrangements, but which may warrant the attention of the Commissioner nonetheless.

In light of the above comments, the Society makes the following recommendations.

Recommendations

The Society recommends that the Bill more thoroughly detail the Commissioner's powers and, in particular, set out the extent to which the Commissioner:

- (1) may be involved beforehand, in an advisory or representative capacity, in the decision-making processes of other government instrumentalities that would impact small business; and
- (2) can act for and on behalf of interested small businesses or be joined as a party to relevant proceedings.

Intervention in business to business dealings

Subsection 8(1)(d) is broadly drafted and might be read as implying a power for the Commissioner to become involved in an extensive range of private commercial dealings between businesses. Presumably the intention of the Bill is for the Commissioner to have a role where there is a systemic or sector-wide issue or problem faced by small businesses. The Bill should specify the types of actions which the Commissioner can take, set out the exact nature of any 'intervention' permitted and detail the criteria that must be met for that intervention to occur. The Society makes the additional recommendations set out below.

Recommendations

The Society recommends that:

- (1) the scope of matters with which the Commissioner may deal be expanded to encompass matters arising beyond commercial dealings or fair treatment;
- (2) the scope of the Commissioner's powers in relation to other government instrumentalities and its legal standing in relation to their decision-making procedures be clarified;
- (3) the criteria that must be met for the exercise of the Commissioner's powers be set out in more detail; and
- (4) details of exactly how and when the Commissioner may intervene in relation to business-to-business dealings be clarified, particularly given the potential sensitivity of businesses to any such intervention.

Reporting functions and powers

Section 9 (*Reporting functions and powers*) sets out the reporting functions and powers of the Commissioner, which include monitoring adverse market practices and preparing reports. Section 10 (*Research and publication functions and powers*) provides for the Commissioner's powers to publish information for small business regarding commercial arrangements between small business and government instrumentalities and to undertake research about small business. The Society felt that it would be worthwhile for the Commissioner to be expressly provided with broad researching and reporting powers to enable the Commissioner to report on positive reforms that may benefit small business which might not necessarily arise in connection with adverse market practices. Such a broad approach would complement the Commissioner's intended role as a sounding-board for small business.

Recommendations

The Society recommends that in addition to its current functions, the Commissioner also be given more pro-active functions. Such functions could include preparing (in addition to the annual report) policy and briefing documents on market or structural initiatives that the Commissioner believes will benefit small business and a regulatory-assessment role for the Commissioner (resource-contingent) as suggested in the Law Council of Australia's submission.

Division 3 – Information gathering powers

Protection of sensitive information

The information gathering powers of the Commissioner, as set out in section 13 (*Power to obtain information and documents*), are designed to facilitate the exercise of the Commissioner's functions. It is important to ensure that the Commissioner is provided with strong investigative powers while being mindful of the disruptive effect that these powers could have on small businesses. It is also important to ensure that confidential information, trade secrets and other sensitive information which may be required to be disclosed during any information gathering process are subject to adequate and appropriate protection. Protections should cover when and in what circumstances such sensitive information must be disclosed and how that information is to be used and protected. We note that the Small Business Commissioner Act 2011 (SA) contains a number of provisions regarding protection of confidentiality which may provide a worthwhile guide.

The "reasonable excuse" defence

A defence of "reasonable excuse" for failure to comply with a notice to attend before the Commissioner is provided under subsection 13(8), but "reasonable excuse" is not explicitly defined. We submit that this defence should be more clearly set out to provide certainty to small businesses and others. The Bill should also clarify whether the protection of sensitive or confidential information can constitute a "reasonable excuse". In relation to the requirement for a defendant to establish such a defence (i.e. the defendant's onus of proof), the Society reiterates the Queensland Law Society's concerns regarding "any provision which reverses the standard of proof and negatively impacts the rights of individuals, without due consideration of defences".

Recommendations

The Society recommends that:

- (1) the definition of “reasonable excuse” be thoroughly and clearly set out;
- (2) express provisions or obligations regarding the protection of trade secrets, commercially confidential and other sensitive information of small businesses be included. In particular the circumstances in which such sensitive information must be disclosed should be set out. The Bill should also be clear as to whether refusal to disclose on the basis of the sensitivity of information constitutes a “reasonable excuse”;
- (3) the information gathering procedures be drafted in a way that strikes an adequate balance between, on the one hand, the need for strong investigative powers and, on the other, the need to avoid unnecessary disruption to small businesses; and
- (4) a provision be introduced for the purpose of protecting the privilege against production of information subject to legal and professional privilege.

Codes of Conduct

The Society notes the Small Business Commissioner of South Australia’s submission in relation to the implementation of enforceable codes of conduct as a means of further protecting small businesses. The Society feels that it would be beneficial for the Standing Committee to consider the inclusion of enforceable codes of conduct to bolster the protections available to small businesses. The recent Small Business Commissioner and Small Business Protection Bill 2012 (NSW) provides one guide. The Society recognises that the complex and diverse nature of small business commercial dealings can present challenges to the workability of any ‘one-size fits all’ code. Nevertheless, principles of fair trading are well-established in modern Australian law and the establishment of a Commonwealth Commissioner provides an opportunity for those principles to be given more weight via enforceable codes of conduct.

Recommendation

The Society recommends that the Standing Committee examine the feasibility of establishing enforceable codes of practice in relation to small business dealings with Commonwealth government instrumentalities.

Final remarks

The Society reiterates its strong support for the purposes of the Bill. The establishment of the Commissioner provides a welcome platform for the advocacy of small business interests at the Commonwealth level.

Yours faithfully

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