



**Small Business
Commissioner**
SOUTH AUSTRALIA

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Dear Mr Bryant

Thank you for your recent invitation to provide a submission to the Senate Economics Legislation Committee Inquiry into the Small Business Commissioner Bill 2013. We appreciated the opportunity to present our views to you regarding this proposed legislation.

Please find attached our submission. .

If you require any clarification of matters raised in the submission we would be most pleased to elaborate at your convenience.

Yours faithfully

Mike Sinkunas
SMALL BUSINESS COMMISSIONER
22 March 2013

Frank Zumbo
DEPUTY COMMISSIONER
22 March 2013





**SUBMISSION TO THE
SENATE ECONOMICS LEGISLATION COMMITTEE
INQUIRY INTO THE
SMALL BUSINESS COMMISSIONER BILL 2013**

March 2013

Context of the submission by the South Australian Small Business Commissioner and Deputy Commissioner

The South Australian Small Business Commissioner and Deputy Commissioner welcome the opportunity to provide input to Inquiry into Small Business Commissioner Bill 2013.

The development of Small Business Commissioners in a number of States (South Australia, Victoria, Western Australia and New South Wales) has made a significant impact in supporting small businesses especially in the area of no or low cost dispute resolution.

In South Australia's case the South Australian Commissioners hold independent statutory offices under the *Small Business Commissioner Act 2011*. (the Act). That statutory independence has been critical to the work of the South Australian Commissioners especially in relation to possible disputes between small businesses and State Government Departments and Agencies. The reality is that an independent statutory office holder has the statutory standing to seek resolution of a possible dispute at the highest levels of a State Government Department or Agency. In practice, our statutory independence, as well as a statutory power to require information, has undoubtedly contributed to the excellent levels of cooperation we have received from State Government Departments and Agencies. This, in turn, has enabled our Office to achieve very high levels of success in resolving potential disputes with State Government Departments and Agencies.

This Act was passed by the South Australian Parliament on 20 October 2011, the Act was commenced on 22 March 2012 and the Office of the Small Business Commissioner officially opened on 29 March 2012.

As part of the reforms the Commissioner has responsibility for:

- administration of the *Small Business Commissioner Act 2011*;
- the *Retail and Commercial Leases Act 1995* ;
- responsibilities under the *Fair Trading Act 1987*;
- recently (from 1 January 2013) responsibilities within the *Health and Safety Act 2012 (SA)*

Key legislative functions and powers under the South Australian Small Business Commissioner model.

Any legislation supporting the role of a Small Business Commissioner needs to clearly set out the roles and functions of the Commissioner. This provides certainty as to the intended role and operation of the Commissioner. This is a central feature of the South Australian Small Business Commissioner legislative model with the key functions of the Commissioner are outlined under section 5 of the Act

5—Functions

(1) The functions of the Commissioner are—

- (a) to receive and investigate complaints by or on behalf of small businesses regarding their commercial dealings with other businesses and to facilitate resolution of such complaints through measures considered appropriate by the Commissioner such as mediation or making representations on behalf of small businesses; and
 - (b) to assist small businesses on request in their dealings with State and local government bodies; and
 - (c) to disseminate information to small businesses to assist them in making decisions relevant to their commercial dealings with other businesses and their dealings with State and local government bodies; and
 - (d) to administer Part 3A (Industry codes) of the *Fair Trading Act 1987* and the *Australian Consumer Law (SA)* to the extent that responsibility for that administration is assigned to the Commissioner under the *Fair Trading Act 1987*; and
 - (e) to monitor, investigate and advise the Minister about—
 - (i) non-compliance with industry codes that may adversely affect small businesses; and
 - (ii) market practices that may adversely affect small businesses; and
 - (f) to report to the Minister on matters affecting small businesses at the request of the Minister; and
 - (g) to report to the Minister on any aspect of the Commissioner's functions at the request of the Minister or on the Commissioner's own initiative; and
 - (h) to take any other action considered appropriate by the Commissioner for the purpose of facilitating and encouraging the fair treatment of small businesses in their commercial dealings with other businesses or assisting small businesses in their dealings with State or local government bodies; and
 - (i) any other functions conferred on the Commissioner by or under this or any other Act.
- (2) The Commissioner is to perform the functions with a view to the development and maintenance in South Australia of relationships between small businesses and other businesses, and small businesses and State and local government bodies, that are based on dealings conducted fairly and in good faith.

These provisions were designed to provide the maximum flexibility for the Commissioners to undertake their duties. This has also undoubtedly contributed to the very high levels of success our Office has been able to achieve in relation to dispute resolution, especially as it has allowed the South Australian Commissioners to respond quickly and in innovative ways to the very wide range of disputes that are dealt with in our Office.

As part of the process of ensuring that the Commissioners have 'teeth' the power to require information was incorporated into the legislation. This outlined in Section 12 of the Act

12—Power to require information

- (1) The Commissioner may, by written notice served personally or by post, require a person to give the Commissioner, within a reasonable time specified in the notice, information in the person's possession that the Commissioner requires for the performance of the Commissioner's functions under this Act.
- (2) A person required to give information under this section must provide the information within the time stated in the notice.
Maximum penalty: \$20 000.
- (3) A person cannot be compelled to give information under this section if the information might tend to incriminate the person of an offence or is privileged on the ground of legal professional privilege.

These provisions have allowed South Australia to develop a Small Business Commissioner model which has to date had quite significant success especially in the key function of dispute resolution to assist businesses across the State. Without a strong legislative base and the independence of statutory positions it is highly unlikely that the results to date would have been achieved. In short, a legislative framework is essential to assisting the work of a Small Business Commissioner. That legislative framework needs to clearly set out the roles, functions and responsibilities of the Small Business Commissioner and needs to provide the Commissioner with the power to require information that assists the Commissioner in carrying the Commissioner's functions.

Summary information relating to the dispute resolution function in the South Australian context

Since the South Australian Office of the Small Business Commissioner opened on 29 March 2012, there have been 4,720 enquires related to a variety of business to business, business to local and /or state government issues (as of 28 February 2013). A breakdown of relevant information is provided below

KEY STATISTICS

Total enquiries to Office (period 29 March 2012 to 28 February 2013 – 11 months of operation)	4720
Total Cases	356
Total Active Cases	85
Total Completed	271
% of all completed cases - successfully resolved	87.7 % (238 of 271 cases)
Total of active and completed cases by category	
Franchising	15 %
General Business	40 %
Retail and Commercial Tenancies	27 %
Local Government	3 %
State Government	8 %
Farming	3 %
Other	4 %

It is important to note that these enquiries have come from a broad range of small businesses, including franchisors and franchisees, retail shop tenants, farmers, along with the myriad of other small businesses seeking the services of the Commissioner.

Significant assistance is provided to businesses at the enquiry stage with issues such as issues relating to a termination of a lease or franchise agreement, end of lease arrangements, outgoings, or disclosure requirements. The Office provides a range of information and advice to support business with these matters. Many issues are resolved at the enquiry/initial assistance stage. Formal Cases only occur when the matter requires more significant intervention by the Office.

The monetary value of these successfully resolved disputes and the additional savings of legal costs for these small businesses vary considerably from disputes involving hundreds of dollars up to those involving millions of dollar.

The number of enquiries and disputes handled in the first year of operation clearly demonstrates the need for the quality dispute resolution and other services that the Office of the Small Business Commissioner provides for businesses in South Australia. The South Australian Commissioners are especially pleased that in successfully resolving disputes those matters have been kept out of the Courts thereby saving both parties considerable time and money. Clearly, the work of the South Australian Commissioner backed by a

measured and balanced legislative framework has assisted all parties to a dispute, whether big or small, to successfully resolve the dispute in a manner that promotes better business relationships between the parties.

The South Australian approach to direct financial penalties and infringement notices for breaches of mandatory codes of conduct under the *Fair Trading Act 1987*

A central feature of the South Australian legislative model is the ability of the Minister for Small Business to prescribe mandatory codes of conduct. These are true mandatory codes of conduct as they are backed by direct civil penalties for breaches of mandatory codes prescribed under the South Australian *Fair Trading Act 1987*. Indeed, under section 86B(1) of the South Australian Fair Trading Act the South Australian Small Business Commissioner is able to commence action in the South Australian Magistrates Court seeking such a civil penalty:

- (1) If the Magistrates Court is satisfied that a person has committed a civil penalty contravention, the Court may make an order (a ***civil penalty order***) that the person pay to the Commissioner an amount as a civil penalty not exceeding—
- (a) in the case of a body corporate—\$50 000; and
 - (b) in the case of a natural person—\$10 000.

With the potential for civil penalties of up to \$50,000 for a company and up to \$10,000 for an individual it is readily apparent that in South Australia there is a meaningful deterrent against breaches of mandatory codes. While not as large as civil penalties for breaches of competition and consumer law provisions,¹ there can be no doubt that the maximum direct financial penalties under the South Australian Fair Trading Act for breaches of mandatory codes will send a clear message to those industry participants covered by such codes under the South Australian Fair Trading Act.

The South Australian Commissioners are given responsibility for enforcing mandatory codes of conduct dealing with business to business issues under the South Australian Fair Trading Act. This is an additional mechanism that will assist small businesses in South Australia and is a valuable part of the South Australian Small Business Commissioner legislative reforms.

Direct financial penalties for breaches of mandatory industry codes – A civil expiation notice

The ability of the relevant South Australian Commissioner to issue a civil expiation notice (more generally known as an infringement notice) under the

¹ See, for example, section 76 of the *Competition and Consumer Act 2010* (Cth).

South Australian Fair Trading Act is another innovative way in which to not only deter breaches of mandatory codes, but to also provide a cost effective way of dealing with alleged breaches of such codes. The intention behind a civil expiation notice is set out in section 86C of the South Australian Fair Trading Act:

If an expiation fee is fixed by the regulations for a civil penalty contravention, a civil expiation notice may be given to a person alleged to have committed the contravention and the alleged contravention may be expiated in accordance with this Subdivision.

Importantly, the legal effect of an `expiation' is outlined in section 86F of the South Australian Fair Trading Act:

- (1) Subject to this Subdivision, if a civil penalty contravention, or contraventions, to which a civil expiation notice relates are expiated in accordance with this Subdivision, proceedings may not be commenced for a civil penalty order against the person to whom the notice was given for that contravention or those contraventions or any other expiable civil penalty contravention arising out of the same incident.
- (2) The expiation of a civil penalty contravention—
 - (a) does not constitute an admission of guilt or of any civil liability; and
 - (b) will not be regarded as evidence tending to establish guilt or any civil liability; and
 - (c) cannot be referred to in a report furnished to a court for the purposes of determining sentence for an offence.

Clearly, the issuing of a civil expiation notice by the relevant South Australian Commissioner is an alternative to commencing court proceedings for a civil penalty. Not surprisingly, a civil expiation fee under a civil expiation notice can only be for a significantly lesser amount than one that can be imposed by the Magistrates Court. With expiation fees of up to \$6,000 for a company or \$1,200 for an individual,² it is apparent that paying an expiation fee allows a person who has allegedly breached a mandatory code or provisions of such a code to quickly resolve the matter without any admission of liability.

² See section 28F(1)(c) of the South Australian Fair Trading Act.

A final word from the South Australian Commissioners

In the experience of the South Australian Commissioners it is essential that a Small Business Commissioner be backed by a meaningful and effective legislative framework. That legislative framework needs to clearly set out the role, functions and responsibilities of the Small Business Commissioner, as well as a Deputy Small Business Commissioner where one is appointed as in the case of South Australia. The Small Business Commissioner needs to also be given the statutory power to require information, as well as the ability to enforce mandatory industry codes of conduct given that such mandatory codes can be a cost effective and targeted way to deal with business to business disputes.

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