Law Council
OF AUSTRALIA
Business Law Section

Mr Tim Bryant
Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Via email: economics.sen.aph.gov.au

25 March 2013

Dear Mr Bryant,

Small Business Commissioner Bill 2013

Introduction

The SME Business Law Committee of the Business Law Section of the Law Council of Australia ('Committee') makes this submission in response to the request from the Senate Standing Committee on Economics for comments on the proposed *Small Business Commissioner Bill* 2013 (SBC Bill).

The Committee is made up of senior legal practitioners working in the commercial and small business area. Its primary focus is the consideration of legal issues affecting small 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 such businesses.

The Committee's submission makes a number of general comments about the SBC Bill.

General comments

The Committee welcomes and supports the decision by government to create the role of Commonwealth Small Business Commissioner (CSBC).

In the Committee's submission to the Department of Innovation, Industry, Science and Research (DIISR) in June 2011, concerning the government's *Options Paper concerning Resolution of Small Business Disputes*, the Committee stated that it was a strong supporter of legislation to create a SBC role at the federal level, rather than the earlier proposal to create a Small Business Advocate.

In this regard, the Committee stated in its submission:

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> *… The Committee support the adoption of the Victorian model where, under the Victorian legislation, the Small Business Commissioner is a neutral and impartial office with primary responsibilities limited to arranging mediation and investigating small-business complaints. It is not an advocacy role but rather an investigatory role, a representational role as an honest broker role. It is precisely because of independence and neutrality that the Victorian Small Business Commissioner model has been so successful.*

Furthermore, the Committee believes that the Government's choice of Mr Mark Brennan to be the inaugural CSBC is an excellent one and members of the Committee, who witnessed the way in which Mr Brennan went about his role as the inaugural Victorian Small Business Commissioner (VSBC), were very impressed with the effective and creative way he carried out this demanding role.

In its earlier submission to DIISR, the Committee also made particular note of the jurisdiction and powers which had been conferred to Mr Mark Brennan when he was the VSBC. The Committee believes that this jurisdiction and these powers greatly contributed to Mr Brennan's effectiveness and success in that role.

Specifically, the Committee noted the following provisions of the Victorian *Small Business Commissioner Act* 2003

Section 5(2) which stated that one of the VSBC's functions was:

> *(c) to receive and investigate complaints by small businesses regarding unfair market practices and mediate between the parties involved in the complaint.*

The VSBC was also given broader ancillary powers under section 4, as follows

> *(4) The Commission has power to do all things necessary or convenient to be done for or in connection with the performance of his or her function.*

Finally, Section 6 conferred on the VSBC a broad investigative function:

> *The Commissioner may investigate any matter relevant to the Commissioners functions and powers under this Act.*

SBC Bill

Powers and functions

The Explanatory Memorandum to the SBC Bill states that:

> *The Commissioner has dispute resolution functions and powers which allow them (sic) to receive and investigate complaints from small business about their dealings with Departments, Statutory Agencies and Executive Agencies of the Commonwealth. It also allows the Commissioner to investigate complaints and facilitate resolutions of the complaints.*

Section 8 of the SBC Bill makes it clear that CSBC's jurisdiction in relation to government is limited to receiving and investigating complaints from small businesses about their

commercial arrangements with Departments, Statutory Agencies and Executive Agencies of the Commonwealth.

In other words, it appears to the Committee that the CSBC's role will be limited to investigating complaints by small businesses that a Commonwealth Agency has behaved in an inappropriate way towards the small business in the context of a contractual relationship between the small business and the Commonwealth for the provision of goods and/or services. If this is so, the Committee believes the CSBC's role is too narrow and limited.

The Committee believes that the CSBC should have a broader role in investigating decisions made by various Commonwealth Agencies which may have had a disadvantageous effect on a particular small-business or on the small business community, more broadly.

The Committee notes that there is a Commissioner of Taxation and an Inspector with particular oversight over the Australian Taxation Office. However, there is no specific person with oversight of other significant Commonwealth regulators, such as the Australian Competition and Consumer Commission (ACCC), Australian Securities and Investments Commission (ASIC) or the Australian Customs Service (ACS) and the Department of Defence.

The Committee notes that the Dawson Committee recommended to the Government that it establish a specific "ACCC Ombudsman". This recommendation was not accepted by the then Government.

While the Committee understands that small businesses which are dissatisfied with the decisions made by such agencies are able to complain to the Commonwealth Ombudsman, in reality this avenue of complaint is quite inadequate. Rather, the Committee believes that the CSBC should have specific jurisdiction to deal with complaints from small business about the way in which Commonwealth Government agencies deal or interact with small businesses irrespective of the existence of a contractual relationship.

The Committee believes that the CSBC should also have a broader role in intervening with a Commonwealth Agency on behalf of a small business in relation to a decision by that Commonwealth Agency not to investigate a particular complaint. The criteria for intervention would be that the decision by the Commonwealth Agency has had or is likely to have a significantly detrimental impact on the small business.

Example 1
This type of role could have been used in the following situation. An association which represents a large number of small businesses lodged a complaint with the ACCC about a proposal by a number of large suppliers to introduce a mandatory booking scheme. The practical effect of the scheme was to force these small businesses to pay a new fee to a third party each time they wished to make a booking. Whilst it appeared to the association, that this conduct was likely to constitute a contravention of the third line forcing provisions of the *Competition and Consumer Act* 2010 (CCA), the ACCC declined to investigate the matter.

Example 2
Another example involves an association, which represents many small businesses in a particular industry sector, which wrote to the ACCC to complain about particular conduct being engaged in by a number of global multinationals. The association believed that the conduct of the global multinationals substantially lessened competition in the market. The ACCC declined to investigate this matter, even though the ACCC's European counterpart, namely the European Commission, had decided to open an in-depth investigation into the very same conduct.

In both of the above cases, the Committee believes that these small business associations would have been aided by having access to a CSBC which they could have approached about their concerns and which they could have asked to intervene with the relevant Commonwealth Agency on their behalf.

Another area where the Committee believes the CSBC should have a specific role is in relation to failures by Commonwealth Agencies to issue guidelines for businesses to explain to how the Commonwealth Agency will be using their existing or newly acquired powers.

Example 3
For example, the ACCC did not issue any substantive guidelines about the way that it would be using its powers to issue infringement notices under the Australian Consumer Law (ACL) until two and half year after it was first given these new powers. The ACCC received a power to issue infringement notices for contraventions of the ACL in April 2010, but did not issue any substantive guidelines about their approach to issuing infringement notices until November 2012.

Whilst the Committee understands that there currently exists a process for governments to assess the likely regulatory impact of legislation on the business sector, the Committee does not believe that this process operates effectively in many cases. The Committee believes that the process of seeking to predict the likely impact of legislation on small businesses before the legislation has been enacted and implemented involves a high degree of crystal ball gazing.

The Committee believes that a better approach would be to provide the CSBC with a role in receiving submissions from small business about the negative impacts of new legislation and then reporting to the relevant Commonwealth agency and the government about these particular impacts. In other words, the SBC Bill should give the CSBC a role in conducting regulatory impact assessments of the impact of legislation on small businesses after it has been enacted and implemented by the relevant Commonwealth agency.

Example 4
An example of a recent law which has had a very negative impact on business, both large and small, was the warranty against defects legislation introduced to the ACL. The Committee believes that the full impact of this particular legislation was not fully understood by either the Government or the ACCC prior the legislation being enacted

Interestingly, the Committee understands that the New South Wales Small Business Commissioner decided to lobby the ACCC about the onerous nature of these new laws.

As a result of her intervention, the ACCC announced that it would be taking a more reasonable approach to the enforcement of this new law – see http://www.smallbusiness.nsw.gov.au/small-business-advocacy/examples-of-success-of-small-business-advocacy/case-3-the-devil-really-is-in-the-detail

It appears to the Committee that the CSBC has much broader jurisdiction to investigate complaints by small businesses against private businesses. Section 8 (1)(d) of the SBC Bill states that the CSBC has the power to:

> *… undertake any action that is appropriate for the purpose of facilitating the fair treatment of small businesses in their commercial arrangements with other businesses.*

The Committee believes that it is appropriate for the CSBC to have a wide mandate to investigate and seek to resolve disputes between small and large businesses. The Committee also believes that the inclusion of the words "fair treatment" will give the CSBC considerable discretion as to the way that it approaches its task.

Definition of small business

The Committee notes that "small business" is defined in section 3 of the SBC Bill as "a business that has 19 or fewer employees". The Committee is concerned that this definition is too narrow and as such it will have the effect of preventing a large number of small businesses from seeking the assistance from the CSBC.

The Committee notes that "small business" is not defined in the Victorian, South Australian or the proposed NSW Small Business Commissioner legislation. The Committee understands that the respective Parliaments took this approach in recognition that there are a wide range of different and inconsistent definitions of small business. As a result, the Committee understands that the SBC's which operate in each of these locations assesses each matter individually in terms of whether the business is a small business.

The Committee believes that the SBC Bill should follow the approach taken in state SBC legislation in relation to the definition "small business" and not define the term. Rather the CSBC should be given a broad discretion to consider each case individually and decide whether the particular business is in fact a "small business".

Reporting functions

The Committee notes that the CSBC has broad reporting functions. Section 9 of the SBC Bill states that the CSBC can monitor and investigate market practices that may adversely affect small businesses and then report to the Minister about any such market practices.

The issue which is not clear from the SBC Bill is whether the CSBC's reports about particular market practices will be made public by either the CSBC or the Minister at some stage. The Committee believes that in order to enhance the transparency of the office of the CSBC, for there should be an obligation included in the legislation for the Minister to release any reports prepared by the CSBC publicly, after a particular period of time.

Publishing information

The Committee notes under section 10, the CSBC has the power to prepare and publish information for small business about entering into commercial arrangements with Commonwealth Agencies.

The Committee believes that the CSBC should have a much broader role in terms of publishing information. The CSBC should also have the role of preparing and publishing advisory information for small business about any issues of significant concern to small business. For example, the CSBC should be able to prepare documents which provide small businesses with:

- insights into how to deal with disputes with the Government or other businesses; and
- general information about the various coercive powers which Commonwealth Agencies have.

The Committee believes that the CSBC would be ideally placed to provide small business with current, practical and relevant information about a wide range of small business issues.

Information sharing

The Committee notes that section 11 of the SBC Bill allows the CSBC to share information with both the ACCC and ASIC. The Committee believes that this is an important aspect of the proposed bill as this provision will make it much easier for both the ACCC and ASIC to further investigate any complaints brought to them by the CSBC.

Information gathering

The Committee notes that the CSBC will have the power to obtain information and documents under section 13 of the SBC Bill.

Section 13(1) gives the CSBC the power to compel persons to provide information or documents, if the CSBC has reason to believe that a person has any information or documents which are relevant to a CSBC investigation.

The Committee also notes that the CSBC has the power under section 13(3) to compel persons to attend before the CSBC to provide information orally. In other words, the CSBC will have the power to conduct examinations of persons who may have relevant information.

However, it is not clear from the legislation, whether the CSBC's powers to compel the production of information and documents or require attendance at an examination will extend to Government Agencies as well as to private individuals and corporations. The Committee believes that this issue should be clarified in the legislation. The Committee notes that there is no statutory safeguard proposed in the SBC Bill to protect legal professional privilege. The Committee is of the view that such a provision should be included.

The Committee also notes that while the legislation creates a sanction where a person fails to attend an examination under section 13(3), there does not appear to be any sanction if a person fails to provide information or documents after receiving a notice from the CSBC under section 13(1).

It appears to the Committee that that the sanctions contained in section 13(6) are limited to a persons who have been required to attend an examination under section 13(3) and do not extent to persons who have been required to provide information and documents pursuant to section 13(1).

The Committee believes this situation is anomalous must be rectified. This anomaly would seriously undermine the effectiveness of CSBC, as it appears that the CSBC currently has no way of ensuring that persons comply with a notice under section 13(1) of the SBC Bill.

The Committee also notes that the fines for non-compliance with section 13(3) are very low - namely, a maximum fine of $2000 for a natural person and $5000 for a body corporate. The Committee believes that these fines have to be significantly increased in order to give CSBC greater ability to ensure that persons comply with notices.

Conclusion

In conclusion, the Committee is concerned that the CSBC's jurisdiction and powers under the SBC Bill, are too narrow and limited and have much less scope than the jurisdiction and powers conferred on CSBC's state counterparts. The Committee believes that if the CSBC is to be effective, its jurisdiction and powers will need to be broadened and enhanced. The Committee believes that the Victorian *Small Business Commissioner Act* 2003 provides a good guide as to the appropriate jurisdiction and powers which the CSBC will need to provide credible and effective assistance to small businesses.

The Committee welcomes the opportunity to comment on the SBC Bill and looks forward to the opportunity for further consultation. Any questions about this submission should be directed to the Committee Chair, Mr Jon Clarke

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Yours sincerely

Frank O'Loughlin
Section Chairman