

ATO RESPONSE

070/2015

10 APRIL 2015

UNCLASSIFIED

FORMAT

MINUTE NUMBER

ISSUE DATE

CLASSIFICATION



Australian Government

Australian Taxation Office

ATO COMMENTS TO DRAFT LEGISLATION AND EXPLANATORY MEMORANDUM – ASBFEO BILL 2015

FILE REF: 070/2015

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COPIES TO: ATO External Scrutineers Unit

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ISSUE DATE: 10 April 2015

RESPONSE DATE: N/A

SUBJECT: Draft legislation to establish Australian Small Business and Family Enterprise Ombudsman

PURPOSE

To provide ATO feedback on the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (ASBFEO) and Explanatory Memorandum

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ADVICE

1. DEFINITIONS OF TERMS

Small business

The Ombudsman's role is with respect to 'small businesses' and 'family enterprises', and we note a very broad interpretation of small businesses has been intentionally used. For the purpose of the ASBFEO, an entity is a 'small business' if it has fewer than 100 employees or revenue of \$5m or less. The Bill's definition of a 'small business' is broader than the ATO's definition of small business.

Tax legislation generally uses the term 'entity' and not 'business' as a reference point for such purposes as the small business entity test, GST, etc. An entity satisfies the small business entity test if it carries on a business, and satisfies the \$2m aggregated turnover test. An entity may carry on one business or multiple businesses.

This comes into play in scenarios where an entity carries out two different businesses, and has 110 employees in total (50 in Business 1, and 60 in Business 2) - in such cases would the entity meet the definition of small business for the purposes of the ABSFEO ie would it be that Business 1 is entitled to engage the Ombudsman but not Business 2, even though it is the same legal entity that operates both businesses? From a tax perspective, it is the entity that is audited/objects/appeals etc not the business.

As there is no grouping provision in the definition of 'small business', many entities within complex structures controlled by high wealth individuals may satisfy the definition of 'small business' on the basis of having fewer than 100 employees. This may result in the entity falling under the jurisdiction of the ASBFEO, when the group (if viewed holistically) would not qualify.

Further, it does not appear to be readily apparent that 'non-corporate' small business operating within one State only is covered, so Treasury may want to consider pre-empting this question arising externally by being explicit about sole traders.

Family enterprises

The definition of 'family enterprise' in section 4 and the meaning of 'family enterprise' in section 6 of the Bill are circular and therefore it is not entirely clear what exactly constitutes a 'family enterprise'. :

"A small business operated as a family enterprise is a **family enterprise** for the purposes of this Act".(s6)

Dispute

The Bill currently refers to an 'action' in relation to the dispute resolution function. An 'action' includes an activity, series of activities, a project, development or undertaking and decision or recommendation amongst other things.

The definition encapsulates a broad range of referrals to the Ombudsman and potentially could relate to a broad range of disputes with the ATO including tax, debt, compensation and maladministration claims and commercial dealings. This affects a large cross-section of the ATO - this is addressed below under the heading *Referrals to relevant agency*.

2. CONFIDENTIALITY/ SECRECY OF TAXPAYER INFORMATION

Further consideration should be given to how inquiries and the requirement to provide information and documents (s.75 and s.76) interact with confidentiality provisions in other Commonwealth legislation.

The ATO is bound by secrecy provisions of the *Tax Administration Act 1953* (TAA 1953) that prevent the disclosure of taxpayer information. Division 355 ('Confidentiality of taxpayer information') prescribes when a Commonwealth employee disclosure of taxpayer information may be made lawfully. Treasury may wish to consider if amendments are required to Division 355 of the TAA 1953 (in particular s.355-65) to include disclosures to the ASBFEO.

Treasury may also wish to consider whether the 2 year / 120 units penalty (under the relevant secrecy provisions in Part 5 – Division 2 of the proposed Bill) is consistent with the Commonwealth Criminal Code penalty for unlawful disclosure under Division 355 above.

3. REFERRALS TO RELEVANT AGENCY

The ATO supports the inclusion of the requirement that the Ombudsman must refer requests for assistance to the Agency best equipped to handle them effectively and efficiently (s.69) as the ATO, which:

- has well-established statutory and administrative mechanisms for taxpayers to dispute an ATO decision, such as under the TAA 1953; and
- is committed to resolving disputes early, saving time, money and resources for all parties. The ATO has increased the use of different alternative dispute resolution approaches, including the introduction of a free in-house facilitation service primarily aimed at small business and individuals. The ATO is establishing a Resolution Hub, which will allow taxpayers to get advice about the best option to resolve their dispute and guidance on how to navigate the process.

Furthermore, complaints about the ATO's administration of tax disputes are currently handled by the Commonwealth Ombudsman, with this function being transferred to the Inspector-General of Taxation on 1 May 2015. Hence, it is our understanding that this new proposed legislation may have limited application to tax disputes.

It would be helpful for the Bill or explanatory material to articulate the circumstances where the Ombudsman may determine a referral is better handled by an Agency.

4. RECOMMENDATION OF ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCESS

It is not clear whether the Ombudsman may include a recommendation for ADR (s.71) when referring a matter to an Agency (s.69). A referral accompanied by a recommendation that effectively binds the agency to a particular course of action could prevent the Agency from handling the request effectively.

We note the Ombudsman may choose to make public the refusal or withdrawal of parties to ADR where a recommendation has been made (s.71(4) and s.74). The circumstances of such a publication could be more clearly defined in the Bill or explanatory material.

Should you require any clarification or further information from us, please contact Tig Hall A/g Senior Director External Scrutineers Unit on (02) 6216 2493 in the first instance.

Thank you for the opportunity to comment on the documents.

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