

Queries/comments on ASBFEO Bill

1. Operation of Division 2 and Division 3, Part 4.

Division 2 is headed 'Responding to requests for assistance'.

Division 3 is headed 'Assistance in a dispute'.

I understand the intended operation of these Divisions is that a request for assistance relating to a dispute lodged with the ASBFEO would be referred (s.69, Division 2) to the relevant State (or Cth) agency which handles such disputes under current State law, where such an agency exists. Division 3 would only apply if there was no such agency to refer the matter to.

However, an alternative interpretation is that Division 3 applies only to assistance requests that relate to disputes, and Division 2 applies to all other types of requests for assistance (but not those relating to disputes). While this may not be the correct legal reading of the Bill, it is important that the intent of the Bill / Act is clear to the reader who may not be expert at legislative interpretation.

The drafting needs to make clear that all requests, including requests relating to disputes, are first considered under Division 2, and only if a dispute request is not referred is Division 3 enlivened.

Regarding the operation of these two Divisions, the Victorian Government Solicitor's Office (VGSO) has advised that:

As currently drafted, clauses 71 and 15(b) leave open the possibility of the Ombudsman exercising the Division 3 powers when a transfer is made under clause 69 and when assistance is given in co-operation with a State agency under clause 70. This is because clause 71(1) does not include any limiting words suggesting its application is confined to the provision of assistance by the Ombudsman. Rather, it confers power where a person 'requests assistance in a dispute in relation to a relevant action'. Similarly clause 15(b) does not contain any such limiting words. It provides 'where a request for assistance relates to a dispute in relation to a relevant action' the recommendation as to the ADR process power may be exercised.

While the limitation may well be imposed by necessary implication due to the terms of clause 69, it is preferable that the limitation be made express, that is, it is preferable that clause 71 is clearly stated to apply when a State (or other) agency is not performing an ADR function.

The VGSO has further advised:

We note that clause 69 uses the term 'transfer' whereas clause 15(a) uses the term 'referring'. It would be preferable for one or other of these terms to be used consistently in the Bill.

2. A further concern relates to the wording of s.69(1)(a)(ii), which also arises in s.75(c)

The subsection requires that the OSBFEO must not give assistance if he believes:

- The request could have been made to another agency...; and
- The request could be more conveniently or effectively dealt with by the other agency; and
- The other agency has the legislative power to deal with the request.

If the other agency could have received the request and has the legislative power to deal with the request, the ASBFEO should not have the discretion to judge whether that agency could more conveniently or effectively deal with the request. In keeping with the intent to not duplicate other agency functions, the request should be referred without qualification.

While 69(2) requires the Ombudsman to consult with the other agency before referring a matter, it would be more appropriate for the other agency, depending on the nature of the request (or based on agreed protocols for a class of requests) to request the ASBFEO to deal with the request on the basis of convenience or effectiveness. (for example, a State based issue which would be better handled on a national basis, as the issue is arising in other States). i.e. The default position should be unqualified referral to the other agency unless that agency, in consultation with the Ombudsman, agrees that the matter is better handled by the Ombudsman.

Similar change would also need to be reflected in s.75.

3. Protected information s.80

This provision is extremely broad and would cover any information or documentation received by the ASBFEO and referred to a State (or Cth) agency in accordance with s.69, as provided in s.69(4)(b).

s.86(1) enables the ASBFEO to provide that information to (eg) a State body and can put conditions on the use, etc. of that information by that agency (s.86(4)). Significant penalties apply if such conditions are breached by the agency.

This provision appears to capture a request for assistance with a dispute referred to a State agency under s.69. Given that the State agency could have received the request for assistance directly, and have the legislative power to undertake the function (as per s.69(1)), it makes no sense for the ASBFEO to put conditions on use of such information or to enliven the offence provisions of s.86. The information received by the ASBFEO will of necessity need to be provided to the State agency for it to do its functions, which will include providing the information to other parties consistent with those functions. This would also appear to impose quite inefficient administrative processes on both the ASBFEO and the State agencies.

A possible solution would be to expand 86(4) to include the qualifier that no conditions will be imposed where the matter is a referral of a request for assistance with a dispute under s.69.

(It is understood that some Cth agencies expressed similar concern about this 'condition' provision and that the drafter has agreed to its removal).

4. Confidential information and naming a party who refuses ADR

S9. definition of confidential information is very broad, and I would suggest that the triggers of 'undue distress', 'embarrassment', and 'unreasonably affect the person or a business or action related to the person adversely' would almost always apply if a person/business was to be named by the ASBFEO for refusing to engage in ADR under s.74.

If the intent is for s.74 to hold regardless of s.9, an appropriate carve-out in s.9 may be appropriate. Otherwise, I doubt there will be much naming of ADR refusal parties.

(I understand that Cth consider that s.74, in the form of a penalty provision, would not be constrained by s.9. However, it is important that the average reader of the legislation is in no doubt that this is the case. Otherwise, significant dispute will arise by parties aggrieved at a s.74 naming, based on their interpretation of s.9)

5. Constitutional issues

The Bill needs to clearly prevent the ASBFEO dealing with all matters currently undertaken by State agencies under State law.

Eg: For dispute resolution under *Retail Leases Act 2003* (Vic), the determination of VSBC power is based on the premises being in Victoria (and being retail premises), regardless of the locality of the landlord, or whether or not the tenant or the landlord are incorporated bodies. Similarly with other Acts.

The Bill should clearly ensure that any (eg) Retail Tenancy dispute relating to premises in Victoria currently handled by VSBC will continue to be so, with the ASBFEO referring any such matter it receives to the VSBC.

To provide further surety that the Cth would not get involved in such matters to avoid duplication with State laws, the Cth Bill could include a provision permitting the State to make a declaration in a State Act which has the effect that the Cth law does not apply to the extent there would be an inconsistency. Examples (in the case of referral of powers to the Cth) are s.259 of the *Personal Property Securities Act 2009* (Cth) and s.24 of the *National Consumer Credit Protection Act 2009* (Cth).

VGSO advice is that while usually seen in instances of referral of powers to the Cth, the Cth has the legislative power to enact such provisions in any Cth legislation, and could do so in

this instance, to ensure even further that the provisions of the Bill do not duplicate existing State laws in the declaring States.

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