



Law Council
OF AUSTRALIA

Business Law Section

Ombudsman Review
Small Business Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600
Via email: sbombudsmanreview@treasury.gov.au

12 April 2017

Dear Sirs

**Response to Discussion Paper dated 15 March 2017
Review of the Australian Small Business and Family Enterprise Ombudsman**

Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The SME Business Law Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) submits this response to the Discussion Paper entitled *Review of the Australian Small Business and Family Enterprise Ombudsman (Ombudsman)* dated 15 March 2017 (**Discussion Paper**).

The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (**SMEs**) 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 SME's.

Please note that the SME Committee's submission may differ from those made by other Committees of the Law Council because of our Committee members' perspectives and experiences as advisers to SMEs.

Response

Thank you for the opportunity to provide a Response to the Discussion Paper. The SME Committee has had a number of interactions with the Ombudsman since the role commenced on 11 March 2016.

The SME Committee has sought to respond, where it is able, to the questions the Review will consider as set out in the Discussion Paper.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS

Purpose

The Committee notes that the purpose of the Review is to examine how efficiently and effectively the Ombudsman has undertaken the assistance and advocacy functions set out under the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (**the Act**) and to make recommendations for any improvements to these functions.

Questions the Review will consider:

Advocacy Function

- Has the Ombudsman been effective as an advocate for small business and family enterprises?

The SME Committee considers that the Ombudsman has been and continues to be an effective advocate for small business and family enterprises. The Ombudsman has developed a profile in the Press for her advocacy in support of small business issues. Her profile became particularly prominent as a consequence of the Minister requesting her to provide a report on the treatment by banks of small business loan clients. The Ombudsman has also recently publicly commented on the practice of some large retailers to extend their terms of trade and then offer expensive finance to small business providers financially disadvantaged by such extension.

In the Committee's view, the profile of the Ombudsman in the Press is the most important and effective method to enable small businesses and family enterprises to identify the Ombudsman as an advocate for them, to influence public opinion, and to have a valuable impact on political decision makers, and on organisations that deal with small businesses and family enterprises.

Assistance function

- Has the Ombudsman been effective in providing assistance to small business and family enterprises?

The SME Committee considers the Ombudsman has been effective in providing assistance to small businesses and family enterprises except where a dispute requires determinative settlement, in which case the Ombudsman is constrained by only being able to 'recommend', rather than to 'require' the parties involved in the dispute to enter into an alternative dispute resolution process.

The Ombudsman is also constrained by not being able to include in such alternative dispute resolution process parties integrally involved in the dispute but who do not have a contractual relationship with the small business or family enterprise. Please see the Committee's response to the last question below for further details.

- Has any assistance given been effective for the operators of small business and family enterprises?

The Committee recognises that the Ombudsman provides education and a variety of support information services and complaint receipt services for small businesses and family enterprises that have been effective in allowing small businesses and family enterprises to understand their positions and legal rights and opportunities.

- Has the Ombudsman effectively cooperated with, and referred matters to, government agencies?

As far as the SME Committee is aware, the Ombudsman has been very active in interacting with and referring matters to government agencies, including, for example, as arising from the investigation undertaken on the way banks deal with small businesses and family enterprise loans.

The Committee is not aware of any tensions between the Ombudsman and any government agencies and is aware that the Ombudsman has good constructive relationships with them, including with the Australian Competition and Consumer Commission and the Australian Securities & Investments Commission.

- Has the Ombudsman effectively managed requests for assistance in relation to disputes, including recommendations on alternative dispute processes?

So far as the SME Committee is aware, the Ombudsman has effectively managed requests for assistance in relation to disputes, including recommendations on alternative dispute resolution processes. However, as set out in these responses, the Committee considers the Ombudsman would be better able to provide access to justice for small businesses and family enterprises if the Act was changed to provide the Ombudsman with power to 'require' parties to disputes, as well as parties integrally involved in those disputes, to engage in alternative dispute resolution processes, including determinative arbitration. Please see the Committee's other responses for more details.

Other matters

- Are there any challenges in identifying the position as an Ombudsman?

As raised before the role was put in place, the Committee considers that the role includes both functions traditionally undertaken by an 'ombudsman', as well as functions traditionally undertaken by a 'commissioner'. Having said that, the SME Committee recognises that the title is only a title, and so long as the functions undertaken provide the outcomes intended by the legislature, identifying the position as an 'ombudsman' should not be an issue.

- Are there any challenges or barriers impacting the Ombudsman's effectiveness in undertaking the advocacy and assistance functions?

The SME Committee considers the Ombudsman's effectiveness in undertaking the advocacy function is currently working well.

However, the Committee believes that the Ombudsman's assistance function is constrained in its ability to facilitate access to justice for small businesses and family enterprises because the Ombudsman is not able to compel parties to a dispute to enter into a determinative dispute resolution process or including arbitration.

The Ombudsman's assistance function would be strengthened and become considerably more effective if the Ombudsman was given power to 'require' entities in dispute to participate in an alternative dispute resolution process, rather than merely to 'recommend' such participation and to 'publish' that a party will not do so or withdraws

from the process, which is currently the case. The Committee supports a change to the Act accordingly.

Commensurate with this change, the Committee also considers that the definition of 'alternative dispute resolution' in section 4 of the Act should be altered to include 'arbitration' as an acceptable process, rather than having 'arbitration' excluded.

The Committee notes that the Franchise, Grocery, Oil and Horticulture Code, although not all mandatory, do provide for referral powers to alternate dispute resolution processes including arbitration as an effective method to settle disputes of a specialist technical nature. In the Committee's view a similar opportunity for small business and family enterprise disputes should be provided through the powers of the Ombudsman.

In addition, the Committee considers it is important that the Ombudsman's powers to 'require' parties to participate in alternative dispute resolution processes should be extended to also include entities that, although not a party to any contract with the small business or family enterprise, are integrally involved in the process to assess and action contractual terms that may be in dispute, such as investigative accountants, valuers and administrators (accountants) appointed by banks and other financiers as the other contracting party, and often paid for by the small business or family enterprise.

Further discussion

The SME Committee would be happy to discuss any aspect of this response. Please contact Coralie Kenny, the Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Yours faithfully



Teresa Dyson, Chair
Business Law Section