

Your Ref: Small Business Commissioner Bill 2011

Quote in reply: Business Law Section

23 March 2011

Small Business Commissioner Project Team
Department of Trade and Economic Development
GPO Box 1264
Adelaide SA 5001

By email: sasbc@sa.gov.au

Dear Small Business Commissioner Project Team

SMALL BUSINESS COMMISSIONER BILL 2011 (SA)

Thank you for the opportunity to provide comments on the draft *Small Business Commissioner Bill 2011* ("the Bill") to the Project Team.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We lead a profession of more than 8,500 members throughout Queensland. The QLS is comprised of several specialist committees who provide policy advice to the QLS Council on law reform and areas of concern to the profession. The QLS also assists the public by liaising with the Government on improvements to laws affecting Queenslanders, and working to improve their access to the law.

This response has been compiled with the assistance of the Business Law Section and the Litigation Rules Section of the Queensland Law Society. The practitioners that comprise these Committees have a thorough understanding of the various issues impacting this area of law.

The Business Law and Litigation Rules Sections have had the benefit of reading the submission prepared and lodged by Law Council of Australia Small Business Committee regarding the Bill, dated 22 March 2011. The Society commends the work that went into that submission and wishes to endorse the LCA submission in its entirety.

The Society has additional comments it would like to make on this Bill.

1. General Application

The Society understands that the Bill has been modelled on the Victorian legislation contained in the *Small Business Commissioner Act 2003* (the Victorian Act). The Bill goes further in many respects than the Victorian Act and contains features not embodied in the Victorian Act, in particular extensive powers to compel the production of information and penalties for non compliance. The need for these extensive powers and penalty provisions is not clear.

2. **Small Business definition**

The functions of the Small Business Commissioner relate to commercial dealings by “small business” with other businesses (whether they are small business or not) in clause 5 although it does not define what is a “*small business*”. It would be useful to be able to easily and clearly identify which enterprises are considered to be “small business” and therefore able to benefit from protection under the Bill.

We note the Victorian Act also does not define “*small business*” however we understand from the “*Frequently asked questions*” section of the Victorian Small Business Commissioner (VSBC) website that eligibility for assistance from VSBC is determined on a “case by case” basis.

The Society therefore recommends that Project Team consider whether the Bill should set out the minimum requirements as to what constitutes a “small business” for the purposes of the Bill or alternatively publish guidelines so that people transacting in the State can easily identify whether they are able to benefit from its provisions.

There are references (or definitions) in a number of State and Commonwealth Acts as to what could comprise “small business”. For example, the *Fair Work Act 2009* refers to it by reference to a test relating to the number of employees. This may confuse many small businesses who may think they can obtain the benefit by reference to an erroneous test under another Act. It may be necessary to ensure any educational material published makes this clear.

3. **Functions**

The Society acknowledges that the Bill is intended to use the Victorian Act as a model and the Bill uses some of the terminology used in the Victorian Act although it appears to do so differently and inconsistently. For example the use of the expressions “*commercial dealings*” and “*unfair market practices*” are applied differently and not defined. The Victorian Act appears to differentiate between them whereas the Bill deals predominately with commercial dealings.

In the Bill:

- (a) The expression “*commercial dealings*” is used in clauses 5(1) (a),(c) and (g); and
- (b) The expression “*market practices*” is used in clause 5(1)(d)(ii).

Whilst the Bill refers to both expressions, neither of them is defined in the Bill. Accordingly it is not clear whether the Bill intends to differentiate between the meanings. Possibly the intention was to simplify the meaning into just commercial dealings. This is not clear.

Clause 5(1)(a) of the Bill expressly provides that the function of the Commissioner to:

“receive and investigate complaints by or on behalf of small businesses regarding their commercial dealings with other businesses...”

The corresponding function in the Victorian Act deals with the power to investigate complaints in relation to “*unfair market practice*” rather than “*commercial dealings*”.

In particular, section 5(2)(c) of the Victorian Act refers to the function to “*receive and investigate complaints by small business regarding unfair market practices and mediate between the parties involved in the complaint.*”

Section 5(2)(d) of the Victorian Act also allows the Commissioner to make representations on behalf of a small business that has made a complaint regarding “*unfair market practices*”. The corresponding provision in 5(1)(a) of the Bill uses the words “*making representations on behalf of small businesses*”. Those representations relate to complaints about “*commercial dealings*” not “*unfair market practices*”.

Section 5(2)(a) of the Victorian Act has a separate defined function “*to facilitate and encourage the fair treatment of small businesses in their commercial dealings with other businesses in the marketplace*”.

The Society suggests that the Project Team takes steps to ensure that if terminology from the Victorian Act is to be used, that the intended meaning is applied correctly to the appropriate function in clause 5 of the Bill.

It is also interesting to note that sections 5(1)(g),(h) and (i) of the Victorian Act deals with matters concerning Government Service Charters and ensuring businesses receive high quality service, whereas the Bill appears to be a departure from the Victorian Act on this issue.

The Society therefore recommends the Project Team reconsider the Bill in light of sections 5(1)(g),(h) and (i) of the Victorian Act.

The Society notes that clause 5(1)(d) of the Bill sets out a particular function of the Commissioner which is similar to the functions contained in sections 5(2)(e) and (j) of the Victorian Act. The terminology is similar to but not identical with the functions contained in of the Victorian Act. In particular, there is no reference to a function to “investigate” market practices.

Clause 5(1)(d) of the Bill provides a function of the Commissioner is:

“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.”

As the regulation of industry codes is a matter also dealt with by the Commonwealth, it is important that the Project Team consider how the Bill will deal with any overlap of jurisdiction to investigate complaints and any referral or consultation with Commonwealth bodies, for example the ACCC, in the regulation and compliance of industry codes prescribed under the *Competition and Consumer Act 2010*.

The Society reiterates the importance of liaising with and engaging with the Commonwealth on this issue of regulatory compliance of commonwealth industry codes.

It also appears that clause 5(1)(d) is wider than clause 5(1)(a), which would effectively confer a wide power on the Commissioner to investigate industry code non-compliance and market practices irrespective of whether a complaint has been lodged.

The Society is concerned that under the Bill, a person could be compelled by the Commissioner to disclose information by the issuance of a notice under clause 12 irrespective of whether a complaint has been lodged with the Commissioner. Normally powers to compel disclosure arise only where a

reasonable ground exists to believe that an infringement has occurred. The Society believes that this principle is a fundamental one which ought not be transgressed.

In addition information that is compulsorily obtained by the issue of a notice in those circumstances would not be assured of confidentiality because the Commissioner has the absolute discretion to permit the release of that information without that person's consent pursuant to clause 13(1)(b) and Schedule 1, 79A(1)(b).

The Society therefore recommends that the Project Team consider recasting clause 12(1) so that the power of the Commissioner to compel production of information is expressly limited only to the investigation of complaints pursuant to the function specified in clause 5(1)(a) of the Bill.

The issue of confidentiality is considered in more detail below.

4. Legal Professional Privilege

Preservation of Legal professional privilege

The Society notes that clause 12 of the Bill may impact the operation of legal professional privilege (LPP), which has an impact not only on the South Australian legal profession, but also the Australian legal profession who may represent clients that are subject to the application of the Bill.

Clause 12(1) provides:

12(1)...". *The Commissioner may by written notice require **a person** to give the Commissioner, within a reasonable time specified in the notice, information that is in the person's possession that the Commissioner requires for the performance of the Commissioners functions under this Act.*"

Clause 12(1) provides an exception in 12 (3) that provides that "**A person cannot be compelled to produce information under this Section if the information might tend to *incriminate the person* of an offence.**"

Therefore when clause 12 is read with clause 5 of the Bill, there appears to be a conflict for Australian Legal Practitioners representing clients in any commercial transactions covered by the Bill as the Bill requires disclosure of information or documentation that is "*in their possession,*" irrespective of whether that could incriminate their client.

This problem arises because the exclusion refers to information that may only incriminate that "person": It does not contemplate or exclude a document covered by LPP or a document or information held under a duty of confidence or any information that may incriminate another person other than the lawyer (for example the information may incriminate their client).

Under the Bill, a person must produce information concerning their client that is "*in their possession*" even if that may be covered by legal professional privilege or confidentiality. A lawyer may breach his professional duty or duties that he owes the client if he is forced to disclose information that is subject to LPP. LPP is a protection afforded to the client, not necessarily the practitioner and it is the client who is entitled to waive or enforce it. There may be significant insurance consequences for practitioners relating to a breach of the duty or an unauthorised waiver of LPP as well. We again refer the Project Team to the

LCA submission on this issue and agree entirely with their submission about protection and preservation of the well recognised concept of LPP.

5. Consent

The Society submits that if a person is required to provide information pursuant to clause 12, the mere provision of that information (and compliance with the Notice) should not be construed as any express or implied consent by that person to the Commissioner to release that information. That consent should be obtained in writing prior to the release of information. Clear guidelines should be published or some form of warning to this effect should be included in the notice.

6. Form of Clause 12(1) Notice

There is no prescribed form of notice specified in the Bill. If the Commissioner intends to release the information then the Project Team should consider the form and content of notice sent under clause 12 (1). The form of notice should be required to contain specific information (or be accompanied with some form of written guideline) and make it clear (amongst other things):

- (a) Whether the Commissioner is seeking the consent of the person or its employer to release that information.
- (b) Whether the Commissioner intends to release that information to the complainant or some other person or body (such as the ACCC);
- (c) Outline clearly that the person or the person's employer has a right to assert that the information is able to be protected by the statutory obligation of confidentiality (and how that assertion will be handled – this may be by reference to a guideline or regulation);
- (d) Specify the relevant section of the Bill for which the information is sought, namely the investigation of a complaint filed with the Commissioner.
- (e) The notice should provide sufficient details about the complaint to enable the person to make a reasonably formed decision as to why the information is required and to identify whether confidentiality protection should be sought or claimed. This applies particularly if the person is in a dispute with the complainant that is either being investigated by another regulatory body (such as the ACCC) or subject to some form of proceeding or dispute resolution method such as mediation.

7. Confidentiality

The issue of confidentiality is considered in clause 13 and Schedule 1 “79A – Confidentiality.”

Clause 13 of the Bill confers only a limited range of 4 categories of types of information that are protected by a statutory duty of confidentiality. Information or documents that are obtained by the Commissioner pursuant to a notice issued by him or her under clause 12(1) are not expressly protected unless they fall within one of the 4 categories even if they are subject to LPP or are otherwise confidential in nature. As there are no clear definitions provided in the Bill for these 4 categories it is difficult to have a simple and complete legal understanding of whether information could fall within one or more of the headings.

It is also not clear whether it is the Commissioner's determination that is final or whether a person can make submissions as to the nature of the information to obtain the benefit of that confidentiality. For

example when information is required to be produced under clause 12(1) it is not clear whether a person is required to specify to the Commissioner at the time it is to be produced, that it believes and asserts that it is a "trade secret" or other protected category.

A person should retain the right to maintain the information falls into the protected category at any time unless it is clear that the Commissioner intends to release it. When and how that person is entitled to make the claim of protection or how any dispute as to that determination is dealt with is not clear in the Bill. There is no express right in the Bill provided to a person or the person's employer to seek relief from a court to prevent disclosure of protected information.

Under the Bill any statutory protection can be removed at any time at the discretion of the Commissioner or if a person's employer authorises its release (clause 13((1)(b) and Schedule 1, 79A(1)(b).) This provides the Commissioner or a person's employer with an extremely wide discretion to allow the disclosure of personal information publicly without the fear of infringing the confidentiality provisions under the Bill. This is one of the reasons why the Society believes that the power to compel production of information should be limited to the function in clause 5(1)(a) only.

The Commonwealth *Privacy Act* and privacy principles apply to protect the privacy of personal information. Unfortunately "personal information" is not defined in the Bill and it may or may not have been intended that it have the same or similar meaning.

Thank you for the opportunity to provide comments and submissions concerning the proposed legislation.

For your information, a copy of this submission will be sent to the Law Council of Australia and the Law Society of South Australia.

Please do not hesitate to contact either myself or have a member of your staff contact our Policy Solicitor, Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au if you wish to discuss these concepts further.

Yours faithfully

Bruce Doyle
President