

Our ref: Business Law Committee

23 March 2013

Senate Standing Committees on Economics  
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Parliament House  
Canberra ACT 2600

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Dear Secretariat

### **SMALL BUSINESS COMMISSIONER BILL 2013 (CTH)**

I write on behalf of the Business Law Committee of the Queensland Law Society regarding the *Small Business Commissioner Bill 2013* (Cth) (“the Bill.”)

The Society supports, in principle, the overarching philosophy of Bill, however has some concern about the intended operation of some of the provisions and that there may be some human rights implications.

#### **1. Definition of “small business”**

Clause 3 of the Bill defines small business as:

*small business means a business that has 19 or fewer employees.*

The Explanatory Memorandum to the Bill affirms that:

*The definition of ‘small business’ is consistent with the Australian Bureau of Statistics definition.*

The Society observes there have been varying legislative definitions afforded to “small business:”

<b>Act</b>	<b>Provision</b>
<b><i>Tax Laws Amendment (2009 Measures No. 2) Act 2009</i></b> <b>SCHEDULE 2 , CGT concessions for small business, Part 1 -- Main amendments, Paragraph 152-10(1)(c)</b>	Note: For determining whether an entity is a small business entity , see Subdivision <b>328-C</b> (as affected by section 152-48).
<b><i>Tax Laws Amendment (Small Business) Act 2007 - Schedule 1</i></b>	<b>Subdivision 328-C - What is a small business entity</b> <b>328-110 Meaning of <i>small business</i> entity</b>

	<p>General rule: based on aggregated turnover worked out as at the beginning of the current income year</p> <p>(1) <b><u>You are a <i>small business entity</i> for an income year (the <i>current year</i>) if:</u></b></p> <p>(a) you carry on a * business in the current year; and</p> <p>(b) one or both of the following applies:</p> <p>(i) you carried on a business in the income year (the <b><i>previous year</i></b>) before the current year and your * aggregated turnover for the previous year was less than \$2 million;</p> <p>(ii) your aggregated turnover for the current year is likely to be less than \$2 million.</p> <p>Note: Section 328-110 of the <i>Income Tax (Transitional Provisions) Act 1997</i> affects the operation of this subsection in relation to the 2007-08 and 2008-09 income years.</p> <p>(2) You work out your * aggregated turnover for the current year for the purposes of subparagraph (1)(b)(ii):</p> <p>(a) as at the first day of the current year; or</p> <p>(b) if you start to carry on a * business during the current year--as at the day you start to carry on the business.</p> <p>Note: Subsection 328-120(5) provides for how to work out your annual turnover (which is relevant to working out your aggregated turnover) if you do not carry on a business for the whole of an income year.</p> <p>Exception: aggregated turnover for 2 previous income years was \$2 million or more</p> <p>(3) However, you are not a <b><i>small business entity</i></b> for an income year (the <b><i>current year</i></b>) because of subparagraph (1)(b)(ii) if:</p> <p>(a) you carried on a * business in each of the 2 income years before the current year; and</p> <p>(b) your * aggregated turnover for each of those income years was \$2 million or more.</p> <p>Note: Section 328-110 of the <i>Income Tax (Transitional Provisions) Act 1997</i> affects the operation of this subsection</p>
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in relation to the 2007-08 and 2008-09 income years.

Additional rule: based on aggregated turnover worked out as at the end of the current income year

(4) You are also a **small business entity** for an income year (the **current year**) if:

(a) you carry on a \* business in the current year; and

(b) your \* aggregated turnover for the current year, worked out as at the end of that year, is less than \$2 million.

Note: If you are a small business entity only because of subsection (4), you cannot choose any of the following concessions:

(a) paying PAYG instalments based on GDP-adjusted notional tax: see section 45-130 of Schedule 1 to the [Taxation Administration Act 1953](#);

(b) accounting for GST on a cash basis: see section 29-40 of the GST Act;

(c) making an annual apportionment of input tax credits for acquisitions and importations that are partly creditable: see section 131-5 of the GST Act;

(d) paying GST by quarterly instalments: see section 162-5 of the GST Act.

Winding up a business previously carried on

(5) This Subdivision applies to you as if you carried on a \* business in an income year if:

(a) in that year you were winding up a business you previously carried on; and

(b) you were a \* small business entity for the income year in which you stopped carrying on that business.

Note 1: Subsection 328-120(5) provides for how to work out your annual turnover (which is relevant to working out your aggregated turnover) if you do not carry on a business for the whole of an income year.

Note 2: A special rule applies if you were an STS taxpayer under this Division (as in force immediately before the

	<p>commencement of this section) in the income year in which you stopped carrying on the business: see section 328-111 of the <a href="#">Income Tax (Transitional Provisions) Act 1997</a>.</p>
<p><b>Fair Work Act 2009 – s23:</b></p>	<p><b>Meaning of small business employer</b></p> <p>(1) A national system employer is a small business employer at a particular time if the <b><u>employer employs fewer than 15 employees at that time.</u></b></p> <p>(2) For the purpose of calculating the number of employees employed by the employer at a particular time:</p> <p>(a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and</p> <p>(b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.</p> <p>(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.</p> <p>(4) To avoid doubt, in determining whether a national system employer is a small business employer at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):</p> <p>(a) the employee who is being dismissed or whose employment is being terminated; and</p> <p>(b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.</p>

The Society recommends that there be consideration as to whether these definitions may be applied to the Bill and to what extent businesses eg franchises, are to apply to this definition. As a minimum requirement, the Society considers that there should be consistency between the Bill and s23, *Fair Work Act 2009*.

## 2. Functions and Powers

The Society is supportive of the dispute resolution functions conferred to the Commission under clauses 7 and 8 of the Bill.

The Society, however, is concerned that clause 13 of the Bill provides the Commission with very broad powers to obtain information and documents, with a failure to comply resulting in

strict liability and a \$2,000 - \$5,000 fine. The Society is concerned that this may impact on the human rights of a person, particularly as the evidential onus of proof is reversed to the person to show there is a reasonable excuse. We also note that the Explanatory Note is silent as to what is intended by reasonable excuse. For instance, it does not allow for a person to claim legal professional privilege as a basis for refusing to supply information that is subject to legal professional privilege that may relate to that person's commercial dealings with a small business.

Of particular concern is that the power to obtain information and documents appears to have a very loose nexus to "small business" as the Commission can require any person to provide information pursuant to clause 13(1):

*(1) Where the Commissioner has reason to believe that a person is capable of giving information or producing documents relevant to a matter that is being inquired into by the Commissioner under this Act, the Commissioner may, by notice in writing given to the 9 person, require the person, at such reasonable place and within 10 such reasonable period as are specified in the notice: 11*

*(a) to give to the Commissioner, by writing signed by that person 12 or, in the case of a body corporate, on behalf of the body 13 corporate, any such information; or 14*

*(b) to produce to the Commissioner any such documents.*

Arguably this definition can extend to professional persons (eg solicitors, accountants) professionally engaged by the small business and who have a statutory duty of confidentiality.

As a general observation, it appears that both State and Commonwealth Parliaments are introducing Bills that contain provisions that reverse the onus of proof to the defendant, impose offences of strict liability and compel the production of information and documentation without noting that legal professional privilege applies. The Society opposes any provision which reverses the standard of proof and negatively impacts the rights of individuals, without due consideration of defences and mitigating circumstances. We also consider that legal professional privilege should continue to be observed as a fundamental recognised legal right.

The Society therefore recommends that the Bill should clearly provide an example of "reasonable excuse," with examples being information and documents where legal professional privilege applies and where parties are statutorily bound by confidentiality.

The Society also considers that the Commission should also have the evidential onus of proof that the notice for information and documents was issued/served on reasonable grounds.

Thank you for the opportunity to provide comments on the Bill.

Yours faithfully

Annette Bradfield  
**President**