

22 July 2015

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

By email to: legcon.sen@aph.gov.au

Dear Ms Dunstone,

Inquiry into the Australian Small Business and Family Enterprise Ombudsman Bill 2015 and the Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015

The Australian Bankers' Association (ABA) appreciates the opportunity provided by your Committee to comment on the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Bill). Our comments are confined to the proposed assistance function for the Small Business and Family Enterprise Ombudsman (Ombudsman) and the scope of the Bill with respect to the coverage of small businesses as defined in the Bill.

There are no matters which the ABA wishes to raise concerning the consequential and transitional provisions Bill.

Assistance role of the Ombudsman

The ABA supports the creation of the statutory office of the Ombudsman which will fill the gap in small business access to complaint handling and dispute resolution services.

In the banking industry there are mechanisms to which small businesses have access similar to the proposed "Assistance" role that the Ombudsman will perform.

Banks have established complaints and disputes handling practices which have been in place for many years. Generally speaking, these complaint and dispute handling arrangements are provided to individual and small business customers of banks. These services are provided free of charge to the customer.

There are two independent organisations which provide external dispute resolution services to which banks and other financial services institutions may subscribe - the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO). Both these schemes are approved and overseen by the Australian Securities and Investments Commission (ASIC) under legislation.

The key independent dispute resolution facility provided by banks for small business customers is the Financial Ombudsman Service (FOS).¹

The ABA's Code of Banking Practice (Code) requires a subscribing bank to provide its small business customers with access to complaint handling and independent dispute resolution services. The Code is contractually enforceable by individual and small business customers.

The ABA agrees with the intended approach taken in the Bill to ensure that the Ombudsman's role to assist small businesses to access complaints handling and alternative dispute resolution services will not duplicate what already exists in the banking and financial services sector.

¹ FOS Terms of Reference see <http://www.fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf>



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At most the Ombudsman would act as a 'concierge' or referral service to these services and would not act as a participant in the external dispute resolution arrangements or refer a small business to another dispute resolution mechanism, such as to a panel of persons which would operate independently of the available banking and financial services complaint handling and dispute resolution arrangements.

The ABA is concerned that the provisions of clause 69 and 8 may not fully deliver this result.

It is clear under clause 69 that the Ombudsman must transfer a request for assistance to another agency of the Commonwealth, a State or Territory. But it is not clear whether a "Commonwealth, a State or Territory" agency as defined in clause 8 of the Bill would include a body such as FOS.

Subparagraph (d) of clause 8(1) (and in 8(2)(e)) includes in the definitions of agency as a "Commonwealth, a State or Territory" agency -

"a body (whether incorporated or not) prescribed for the purposes of this paragraph".

The ABA suggests that the relevant subparagraphs of subclauses 8 i.e. (1)(d) and (2)(e) are amended to ensure that "a body (whether incorporated or not)" is not limited by the forgoing subclauses in clauses 8(1) and (2) section.

The ABA believes that a private sector external dispute resolution scheme, such as FOS, which is contractually based on membership of financial institutions (and other private sector entities) is not a body established for a public purpose under a law of the Commonwealth, a State or Territory within the meaning of subclauses 8(1)(b) and 8(2)(c) respectively.

Further, and for the avoidance of doubt the ABA suggests that Clause 71 of the Bill makes it clear that this clause is subject to clause 69 to avoid a potential conflict between the two provisions.

In respect of a dispute between a small business and a financial institution, the Ombudsman should refer the dispute to the financial institution's internal complaint handling process in the first instance. If the complaint has been dealt with by the financial institution but the small business is dissatisfied with the outcome, the Ombudsman should refer the dispute to an ASIC approved scheme of which the financial institution is a member, for example FOS.

To achieve this it will be important to stipulate in clause 72 of the Bill that the Ombudsman must (not simply "may") publish a list of persons which the Ombudsman considers are qualified or experienced to resolve disputes. The ABA considers that this list must contain any external dispute resolution scheme approved by ASIC under financial services legislation such as FOS and CIO. Otherwise, this would create the risk of duplication by the Ombudsman for these services which the Bill is seeking to avoid.

Duplication would add cost, confusion and uncertainty for the parties as to the most appropriate dispute resolution service which has the independence, experience and expertise to handling the dispute efficiently and effectively.

Definition of "small business"

The definition of a "small business" in clause 5 of the Bill appears that it would capture businesses that could be significantly larger than what are generally considered to be small businesses.

Clause 5 of the Bill provides

A business is a small business at a particular time in a financial year (the current year) if:

(a) it has fewer than 100 employees at that time; or

(b) either:

(i) its revenue for the previous financial year is \$5,000,000 or less; or

(ii) if there was no time in the previous financial year when the business was carried on its revenue for the current year is \$5,000,000 or less.



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A business having up to 100 employees (including part time employees counted as fractions of full time employees) irrespective of whether the business is engaged in manufacturing could be a very substantial business and even considered likely to be a large business.

Clause 5 suggests that if the business has more than 100 employees, it will be a “small business” limited only by its annual revenue which is to be up to \$5million.

The ABA has not conducted a survey of all small business definitions in Australian legislation which are based on employee numbers that might exceed 100 employees which we believe would be unusual and probably an exception to the rule.

The ABA believes that the definition in clause 5 of the Bill should be amended.

This could be achieved if the word “and” is substituted for the word “or” at the end of 5(a).

In light of the potential for overlapping functions of the Ombudsman with the functions of financial services regulators, particularly with ASIC, the ABA believes a review after two years of the operation of the Ombudsman and the Bill once it has become legislation is conducted in consultation with interested parties. The ABA would welcome the opportunity to participate in such a review if the Committee felt disposed to recommend a post-implementation review.

Yours sincerely

Ian Gilbert
Director Banking Services Regulation