



# Association of Accounting Technicians response to Small Business Commissioner role

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## 1. Introduction

- 1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the consultation paper on Small Business Commissioner role, released on 26 July 2015.
- 1.2. AAT is submitting this response on behalf of our membership and from a wider public benefit perspective.
- 1.3. AAT has added comment in order to add value or highlight aspects that need to be considered further.
- 1.4. AAT has focussed on the operational elements of the proposals and has provided opinion on the practicalities in implementing the measures outlined.
- 1.5. Furthermore, the comments reflect the potential impact that the proposed changes would have on SMEs and micro-entities, many of which employ AAT members or would be represented by our operationally skilled members in practice.

## 2. Executive summary

- 2.1. AAT is pleased to note in the forward to the condoc that the Minister for State for Small Business, Industry and Enterprise recognises that small businesses are “vital to our economic growth” and that as such “it is in all of our interests that we have a business environment where they can carry out their day to day business and thrive.”
- 2.2. In the past there has been a tendency for legislation to be developed for larger businesses and then retro-fitted for Small and Medium Size Entities (SMEs). AAT has long felt there is a clear need to be mindful of those at the smaller and micro end of the business spectrum at the design stage of proposed new legislation to ensure that whatever is subsequently enacted is proportionate, simple and cost-effective.
- 2.3. In recognition of the observations made in 2.2 (above) AAT welcomes any moves by HM Government and its departments to address the “imbalance in bargaining power” (2.2, condoc) experienced by small businesses when dealing with larger businesses.
- 2.4. Furthermore, AAT is unreservedly supportive of the proposal to create a Small Business Commissioner (SBC) post, which we see as a positive signal to small business. Indeed such a move would be a clear indication that their value to UK-PLC is understood.
- 2.5. While AAT remains to be convinced that the imbalance in bargaining power can be fully addressed, the creation of a SBC post would in and of itself be sufficient to help change a significant proportion of the population of large businesses’ behaviour towards their smaller business counterparts (3.15 & 3.16, below).
- 2.6. Without doubt there is a need to tackle the historic imbalance on issues such as prompt payment. Despite this having been given attention through the introduction of the Prompt Payment Code, bigger businesses continue to regularly impose unfavourable payment terms of the type set out in 3.3 – 3.9 (below) on their smaller business suppliers who are reluctant to take issue for fear of not being awarded a contract or repeat contracts (3.14, below).

- 2.7. AAT considers the proposal to create a small businesses dispute-resolution pathway (2.5 & 2.6, condoc) to be highly commendable, particularly if it achieves its stated aim of “preserving important commercial relationships.” If successful the pathway will help small businesses by opening up a low-cost dispute resolution service when so many of them historically have been unable to afford to enter into costly court action (3.15, below).
- 2.8. Mindful of the fact that it is an accountancy body, AAT has restricted its response to questions posed in the condoc where as a representative body we can add value to the consultation-in-hand and/or have relevant experience or knowledge of.

### 3. AAT response to the consultation paper on Small business commissioner role

- 3.1. The following paragraphs outline AAT’s response to the proposals outlined in the consultation paper.

**Question 1: What evidence do you have of unfair or unfavourable treatment of small businesses in contract negotiations during the last 2 years?**

**Question 2: What circumstances can make these practices unfair to small businesses?**

**Question 3: Have you ever tried to challenge proposed contract terms or arrangements, or refused to enter a contract including terms, that are unfavourable or you believe are unfair? If you have, under what circumstances and what was the outcome? If not, why not? Please provide specific examples (which may be anonymised) wherever possible.**

- 3.2. As a representative body AAT does not have direct experience of unfair or unfavourable treatment of small businesses in contract negotiations.

**Question 4: Do you have concerns about any of the practices in the table above? Are there circumstances in which the practices are particularly problematic for the day-to-day running of your business?**

- 3.3. While not directly affected by the subject matter outlined in question 4, AAT does indeed have concerns in respect of a number of the practices outlined in the Payment Terms and Practices Table (6.12, condoc).
- 3.4. When taken as a whole and accepting that in all of the listed instances small businesses are the suppliers the cited terms and practices either explicitly, or at the very least implicitly, serve to reinforce the perception that there is a lack of parity between the contracting parties very much in favour of larger businesses.
- 3.5. Instances given in the table lend support to the widely held belief that a large business is able to dictate terms to its smaller supplier on the basis that “if you want our business this is the terms you have to accept.”
- 3.6. Extended payments terms can lead to cash-flow problems, even resulting in their overtrading<sup>1</sup>, the need to either run extended overdrafts or even consider funding their cash-short-fall by factoring.
- 3.7. Furthermore, such factors can impact on the ability of a small business to meet its tax liabilities

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<sup>1</sup> **Overtrading:** Overtrading often occurs when companies expand their operations too quickly where an increase in interest expenses negatively impacts on the net profit leading to a feedback loop of a reduction in working capital, further borrowing followed by further interest charges until eventually they face a liquidity problem.

3.8. AAT is concerned that pay-to-stay flat charges levied by larger businesses on their smaller suppliers is a clear abuse of the dominant position in the relationship of the former over the latter. If the proposal to create the post of a Small Business Commissioner is taken forward the SBC should be given the remit to explore the appropriateness of such tactics and even to be given the powers to outlaw such practices.

3.9. AAT is similarly concerned over:

- (i) retrospective discounts;
- (ii) discounting 'balance sheet bonuses' to outstanding money owed to a supplier and;
- (iii) stocking & cash fees paid up-front by a supplier;

and as a result would expect an SBC to be given powers similar to those outlined at 3.8, (above) in order to ensure that large businesses are not seeking to exploit their dominant buying power.

**Question 5: Are there circumstances in which the practices listed in the table above are acceptable? Are there circumstances in which they can benefit suppliers? If so, how?**

3.10. The only way that the practices listed in the Payment Terms and Practices Table can be seen as acceptable and of benefit to the supplier is through the employment of a type of convoluted logic which, if employed, would seek to argue that by accepting the terms offered by a larger business the smaller business benefits from the potential of being awarded supply contracts that they would otherwise not gain if they did not accept the terms on offer.

**Question 6: Have you ever experienced any of the practices listed in the table above? If yes, which ones, when and how many times? Did they benefit or harm you?**

3.11. As a representative body AAT has not experienced any of the practices listed in the table.

**Question 7: Are there other unfavourable or unfair payment practices which you have encountered? Please provide examples (these may be anonymised).**

3.12. As a representative body AAT has not encountered any other types of unfavourable or unfair payment practices.

**Question 8: If you are a small business, or a representative organisation for small businesses, what could be done to encourage more businesses to claim interest and late payment charges where appropriate and create an environment in which this is considered the norm?**

3.13. While acknowledging the good intent behind this question, AAT does not consider much more can be done to encourage smaller businesses to claim interest and late payment charges where such action might be appropriate.

3.14. The main deterrent to such businesses from seeking to claim interest and late payment charges from an errant dominant customer is their fear, real or perceived, that through the claiming of interest and the levying of late payment charges small businesses would expose themselves to a significant risk that they would not be awarded future supply-contracts.

**Question 9: How could the new Commissioner be helpful in resolving late payment disputes?**

- 3.15. After acknowledging AAT's comment that only a few small businesses are likely to raise late payment disputes (3.14, above) a SBC could be helpful in resolving late payments disputes through the development of an arbitration and dispute resolution service (mediation service) as a cost-effective alternative to entering into litigation.
- 3.16. In addition to the provision of arbitration and dispute resolution service AAT agrees that the other two of the three proposed main services to be provided by the SBC as outlined in 7.6 (conduc), would be a vital and beneficial part of the commissioner's function as noted below:
- (i) The provision of support and advice via phone, web and social media;
  - (ii) A complaint handling service.

**Question 10: Have you ever taken action to resolve disputes about these wider supply chain issues? If yes, under what circumstances and what was the outcome? If not, what deterred you? (Examples may be anonymised.)**

- 3.17. AAT has not entered into action to resolve supply-chain disputes.

**Question 11: How could the new Commissioner be helpful in resolving those disputes?**

- 3.18. AAT does not have any comment to make in respect of question 11.

**Question 12: Do you agree that the Commissioner should provide general information and advice to small businesses on a confidential basis, in relation to a dispute with businesses which are medium-sized or large?**

- 3.19. AAT strongly agrees that the Commissioner should provide a confidential general information and advice service to small businesses in relation to disputes such entities might have with their larger counterparts.
- 3.20. The provision of such a service would enable small businesses to access timely advice without incurring prohibitively expensive legal advice.

**Question 13: If you are aware of other advice services for small businesses that assist with dispute resolution, have you used them? If yes, please describe your experience and whether it was positive or negative. If no, why did you decide not to use the advice service?**

- 3.21. AAT is unaware of any other dispute resolution service other than the Financial Ombudsman Service (7.20, conduc).
- 3.22. AAT has not had cause to make use of a dispute resolution service.

**Question 14: Would you consider using a mediation service to support you in settling a dispute with another business?**

- 3.23. As a representative body AAT declines to make comment in respect of question 14.

**Question 15: Are there any barriers that would prevent you from using a mediation service?**

- 3.24. As a representative body AAT declines to make comment in respect of question 15.

**Question 16: Do you agree that the Small Business Commissioner should offer mediation (whether in-house or via a third party)?**

- 3.25. Yes, for the reasons given in AAT's response to question 12 (3.20 above) we consider that the SBC should offer access to a mediation service either directly or indirectly.

**Question 17: Do you agree that the Small Business Commissioner should be able to adopt either or both of the measures set out above to encourage meaningful participation in mediation?**

- 3.26. AAT is pleased to note that the government does not propose to compel businesses to attend mediation.
- 3.27. While in the vast majority of cases mediation would be the best lower-cost option and therefore the remedy of choice, there may be instances when a court ruling might be considered by both parties to be the appropriate approach e.g. where settlement of payment requires a garnishee order over a disposal of assets.
- 3.28. AAT considers the publishing of advice and guidance in respect of good practice and dispute resolution by the SBC (bullet point 1, 7.17, condoc) as a fundamental-prerequisite. Indeed if the SBC was not given this within their opening remit it would be immediately called for by small business.
- 3.29. In instances of failed mediation because of one party's failure to participate it would certainly be helpful to the courts to be aware of all the facts in respect of case before them when deciding on the awarding of costs. If the best way for this to be achieved is through the issuing of "certificates" AAT would be supportive of the introduction of such a device.
- 3.30. It should be noted that in giving our response to the issuance of certificates it has been made from an operational perspective and not from a legal due-process point of view. Other respondees with greater legal expertise may present valid reasons why a certificate process should not be introduced.

**Question 18: Are there any measures you think should not be used or others we have missed? Please explain your reasoning.**

- 3.31. AAT does not have any other measures to recommend.

**Question 19: Do you agree with the framework set out above for:**

- 3.32. AAT welcomes the introduction of a framework to submit a complaint in respect of a medium-sized or large business by a small business as set out 7.19-7.27 (condoc).
- 3.33. In order to avoid confusion and unnecessary duplication AAT agrees that in instances where an existing [effective] dispute resolution service exists the SBC should reserve the right to refer relevant disputes to it.

**a. Looking into individual complaints?**

- 3.34. While AAT agrees with the framework as set out it does have concerns over the efficacy of the SBC.
- 3.35. In particular AAT is concerned that without the powers listed below:
- i. Ability to require business cooperation (7.22, condoc),
  - ii. Ability to award financial compensation (7.25, condoc),
- The SBC could be construed by some to be toothless and as a consequence not taken seriously by a small number of larger businesses who are likely to make up most of the population that this worthy initiative is being aimed at.

**b. Making recommendations including the factors to be taken into account? What factors do you think should be considered by a Commissioner in deciding if the behaviour of a business has been fair and reasonable?**

3.36. Factors that should be taken into consideration:

- i. What is considered to be normal contractual custom and practice within a particular industry?
- ii. The relative size of the contacting parties.
- iii. Whether unforeseen and unavoidable circumstances had arisen such as supply chain delays.
- iv. What steps both parties had taken prior to the SBC involvement in order to resolve the matter now before the Commissioner.
- v. Should the dominant party to the contract know that their behaviour might lead to undue hardship for the smaller supplier?

**c. Publishing information about specific findings?**

3.37. While supportive of the proposal to publish information in respect of specific findings, in the absence of research into the impact taking such actions, particularly on the smaller party, AAT would expect it to be anonymised.

**d. Producing annual reports?**

3.38. AAT considers the proposal to publish annual reports to be an essential function of the SBC.

3.39. In giving support to the proposal to produce and publish an annual report and mindful of the earlier comment over the need to publish anonymised information (3.37, above) AAT would not be supportive of the publication of findings on specific cases where the information is of a nature that would enable the easy identification of the parties concerned, especially the smaller business counterpart.

3.40. If specific findings are published which either explicitly, or implicitly, refer to the affected smaller business there is a real danger that it might count against it when entering into contracts with future larger customers.

3.41. AAT considers that risk of the scenario outlined in 3.40 (above) occurring could act as a significant deterrent to smaller businesses seeking the services of the SBC.

**Question 20: Comments on this outline of costs and benefits are welcome. For example are there any additional costs or benefits that you identify being associated with the establishment of the Service? Please provide any analysis you may have to inform our costs and benefits assessment.**

3.42. In the absence of sufficient relevant knowledge of the mechanics of dispute resolution AAT declines to make comment in respect of question 20.

**Other comments not made in direct response to the condoc questions**

3.43. One other way in which AAT believes the government could help small and micro businesses is through ensuring that they have access to good quality operational tax and accountancy support. All too often government departments help perpetuate the belief that chartered accountancy advice is the only solution.

3.44. Due to the relatively high cost of chartered accountancy advice many start-up and fledgling small and micro entities are deterred from seeking what would otherwise be timely advice.

- 3.45. The concerns expressed in 3.43 and 3.44 could in part be addressed if government departments through the GOV.UK website compared and contrasted the services offered by chartered bodies to those offered by self-regulating technician bodies such as AAT.

#### 4. Conclusion

- 4.1. While not directly affected by the subject matter outlined in question 4, AAT has concerns about a number of practices outlined in the Payment Terms and Practices Table (6.12, condoc).
- 4.2. The examples in the Payment Terms and Practices Table serve to reinforce the perception that there is a lack of parity between the contracting parties in favour of the larger business (3.13–3.9, above).
- 4.3. AAT would like to see a SBC given powers sufficient to ensure that large businesses are not seeking to exploit their dominant buying power (3.9, above).
- 4.4. AAT is concerned that due to the imbalance of power in reality not much more can be done to encourage more businesses to claim interest and late payment charges where such action might be appropriate (3.13 & 3.14 above).

*For example:*

*Small businesses are deterred from seeking to claim interest and late payment charges from an errant dominant customer out of a fear that they would not be awarded future supply-contracts.*

- 4.5. AAT is supportive of the proposal for the SBC to provide an arbitration and dispute resolution as a cost effective and administratively simple alternative to a recourse to the courts system (3.15, above).
- 4.6. In addition to mediation AAT would like to see further consideration being given to the provision of support and advice via phone, web and social media as well as a complaint handling service (3.16, above). All three services would be of great benefit to smaller businesses that are often cash-starved and as a result unable to have access to high cost legal advice.
- 4.7. AAT welcomes the proposal to introduce a framework to enable small businesses to submit complaints for review by the SBC (3.34, above).
- 4.8. AAT considers the proposal to publish details of cases handled by the SBC and an annual report to be essential elements of the Commissioners role. However, support is given on the basis that the details published must be sufficiently anonymised to ensure at the very least that the complainant cannot be identified (3.39, above).

#### 5. About AAT

- 5.1. AAT is a professional accountancy body with over 49,300 full and fellow members<sup>2</sup> and 76,400 student and affiliate members worldwide. Of the full and fellow members, there are over 4,100 members in practice who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.
- 5.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

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<sup>2</sup> Figures correct as at 30 June 2015

## 6. Further information

If you have any questions or would like to discuss any of the points in more detail then please contact AAT at:

email: [consultation@aat.org.uk](mailto:consultation@aat.org.uk) and [aat@palmerco.co.uk](mailto:aat@palmerco.co.uk)

telephone: 020 7397 3088

Aleem Islan  
Association of Accounting Technicians  
140 Aldersgate Street  
London  
EC1A 4HY