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Association of Accounting Technicians response to the Department for Business, Energy & Industrial Strategy consultation “Small Business Commissioner: policy for secondary legislation”

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1. Introduction

1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the Department for Business, Energy & Industrial Strategy (BEIS) consultation "Small Business Commissioner: policy for secondary legislation", published on 13 October 2016.

1.2. AAT is submitting this response on behalf of our membership and for the wider public benefit perspective of having an efficiently functioning business sector that encourages growth and development in the economy.

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 of 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 AAT's 4,250 licensed accountants.

2. Executive summary

2.1. **AAT is supportive of the Small Business Commissioner (Commissioner) concept.** The Commissioner will help small businesses resolve payment disputes and avoid future issues by encouraging a cultural change in how businesses deal with each other.

2.2. **The suggested 6 month time limit for complaints to be made to the Commissioner seems reasonable.** However it is important that the Commissioner has discretion to extend the time limit (3.3, below).

2.3. **The Commissioner should not be allowed to notify respondents where the complaint is not relevant or has been dismissed**. This is because doing so it should be considered to be 'wrongful disclosure' (3.9, below).

2.4. **The Commissioner should take into account the relative bargaining power of parties**. However, the Commissioner should not take the relative bargaining positions into account where the complainant small business, who had agreed to the original terms and conditions, subsequently raises a complaint simply because they have decided that the terms are unfair and no longer satisfactory (3.12, below).

2.5. **AAT recommends adopting a transparent means of reporting the Commissioner's decisions.** This would enable the identification of larger businesses that have repeatedly demonstrated unfair trading terms and practices, which could be loosely based on the Amazon buyers/sellers model (3.21-3.22, below).

3. AAT response to the Department for Business, Energy & Industrial Strategy consultation "Small Business Commissioner: policy for secondary legislation"

Paragraph 6.2 - 6.8

Question 1*: Do you agree with the proposals set out in paragraphs 6.2 – 6.7 for how and when to calculate a business's staff headcount to determine whether they are a 'small business' which can use the Commissioner's services?

3.1. AAT agrees with the proposal that companies with a headcount of fewer than 50 staff should be eligible for assistance and believes this to be a sensible definition. AAT also welcomes the flexible interpretation around this (e.g. headcount rather than full time equivalents) and the wide range of business types covered within the proposals.

Paragraph 6.10 - 6.11

Question 2: Are there any circumstances, instead of or in addition to those specified in paragraph 6.11, where it would be appropriate for the small business to complain to the Commissioner without first raising the issue with the respondent?

3.2. In most circumstances it would be appropriate for the complainant to raise their complaint with the respondent. However, in some circumstances, there may be genuine reasons as to why a complainant would wish to remain anonymous, for example where there is a genuinely held belief that their contract may be cancelled, future contracts not awarded or some other negative impact upon their business. In these situations it may be appropriate for the Commissioner to consider the complaint without the complainant having first raised the issue with the respondent.

Paragraph 6.12 - 6.15

Question 3: What should be the time limit for complaints to be made to the Commissioner, should the Commissioner be able to extend it, and in what circumstances (other than those listed)?

3.3. Complaints should be raised promptly by the complainant and the six month limit suggested in paragraph 6.14 would seem reasonable, given that the usual settlement period for invoices is 30 days, provided the Commissioner has the discretion to extend the time limit in certain circumstances. Similarly, the respondent businesses should be required to respond within reasonable timescales yet to be determined by the Commissioner so that the Commissioner obtains positive resolutions in a timely manner. This will limit the ability for the respondent businesses to obfuscate and delay payment.

Paragraph 6.16 - 6.17

Question 4: Do you agree that the complaints to the Commissioner should meet the requirements in paragraph 6.16? Please list any other requirements that should be considered.

3.4. Yes. It may also be useful to ask the complainant if the matter has or is being raised in some other court by either the complainant or respondent. This would be useful in establishing whether or not the complainant intends to use the Commissioner intervention as an indication of wrongdoing by the respondent in order to support or defend the court case.

Paragraph 6.18

Question 5: Do you agree that the Commissioner should be able to dismiss a complaint in these instances? Please list any other circumstances where the Commissioner where the Commissioner should be able to dismiss a complaint.

3.5. Yes. Furthermore, the Commissioner may also want to include in its regulations that its decision is final and not appealable in order to avoid getting bogged down by vexatious

complaints. If the complainant small business wishes to take their complaint further then it can still do so by seeking a legal remedy through the courts.

Paragraph 6.19

Question 6: Do you think that there are specified circumstances in which the Commissioner should be able to dismiss a complaint, which are not covered by the general factors listed above?

3.6. No.

Paragraph 6.20

Question 7: Do you agree that the Commissioner should be able to fix and extend time limits for any aspect of the complaints handling process?

3.7. Yes. The time limits are important in keeping the process moving by not allowing either the complainants or respondents to obfuscate and delay the process. However, the Commissioner should be allowed to extend time limits where it is reasonable to do so.

Paragraph 6.21

Question 8: Do you agree that the Regulations should require the Commissioner to notify a complainant if their complaint is out of scope or dismissed, and explain the reasons why it will not be considered?

3.8. Yes.

Paragraph 6.22

Question 9: When a complaint is not relevant, or dismissed, should the Commissioner be allowed but not required, to notify the person against whom a complaint is made?

3.9. When complaints are not relevant or have been dismissed then it would be unethical for the Commissioner to notify the respondents and this should be considered to be 'wrongful disclosure', and s.19 of the Commissioners for Revenue and Customs Act 2005[1] should be used as the template for the Commissioner.

Paragraph 6.26 – 6.29

Question 10*: Do you agree that the Regulations should require the Commissioner to take into account the conduct, behaviour and practice of the parties but that examples of these should not be listed in the Regulations, leaving the Commissioner to decide what to include in this consideration?

3.10. Yes, it seems reasonable to give the Commissioner the flexibility to take the conduct, behaviour and practice of the parties into account. Mindful of the issues this generates around subjectivity and the need for consistent judgement, AAT recognises that it is often difficult to codify without the benefit of hindsight so once the Commissioner has dealt with a few cases then it may be easier to establish common themes and precedents.

Paragraph 6.30 - 6.37

Question 11*: If you answered No to Question 10 and think the Regulations should set out specific indicators of behaviour, conduct and practice and for the Commissioner to assess compliance with these, which of the above, or any other, indicators should be included?

3.11. Answered 'yes' to Q10 so no response required.

[1] Commissioners for Revenue and Customs Act 2005

Paragraph 6.38

Question 12: Do you agree that the Commissioner should consider the relative bargaining position of the parties and the use of that position by the stronger party to the detriment of the weaker party when considering what is fair and reasonable?

3.12. Yes, given that this is the primary reason for establishing the SBC it would be very odd indeed were the relative bargaining positions of the two parties not to be taken into account. However, the Commissioner should not necessarily take the relative bargaining positions into account where the complainant small business, who had agreed to the original terms and conditions, subsequently raises a complaint simply because they have decided that the terms are unfair and no longer satisfactory.

Paragraph 6.39 – 6.46

Question 13: Do you agree that the Commissioner should consider the impact of the act or omission when considering what is fair and reasonable but that particular impacts should not be listed in the Regulations?

3.13. Yes, as an act or omission follows from the clean hands doctrine[2] and may impact the Commissioner's perception of what is fair and reasonable, therefore where an act or omission comes to light then the Commissioner needs to consider this and state that it was a factor in establishing what was fair and reasonable in the circumstances. It is reasonable not to list particular impacts.

Question 14: If you think particular types of impact should be listed, which should be included in the Regulations?

3.14. Agreed to Q13 so no response required.

Question 15*: Are there any other factors that should be included in the Regulations (in addition to the four proposed)?

3.15. The proposed factors 1 to 4 are widely drafted and likely to encompass all relevant factors.

Paragraph 6.41

Question 16: Do you agree that the Regulations should not list specific types of cases nor therefore corresponding additional factors that the Commissioner must take into account when determining what is fair and reasonable in those specific types of cases?

3.16. It is reasonable not to list specific types of cases in order to avoid the risk of any specified practice being seen as the only practices covered by the Commissioner, as mentioned in 6.41.

3.17. However, the Commissioner will be operating in an area where law, custom and practice changes over time as may the public's attitude towards sharp practices which may impact on what is perceived to be fair and reasonable. Therefore, it is important that the Commissioner notes any new and additional factors in rulings to acknowledge the reason for the change in practice, while still maintaining consistency before and after the change.

Question 17: If you answered No to Question 16, what should the specified circumstances be? And what should the additional factors be in relation to those circumstances?

3.18. Agreed to Q15 so no response required.

[2] http://thelawdictionary.org/clean-hands/

Paragraph 6.42 – 6.45

Question 18*: Which factors (including but not confined to those above) should the Regulations set out for the Commissioner to take into account when considering whether to name respondent in a published report?

3.19. A comprehensive list of factors is included in 6.45 and AAT has no suggestions for further factors to be considered.

Paragraph 6.46

Question: 19: If you disagree that there should be no specified circumstances that give rise to additional factors that the Commissioner must take into account when deciding whether to name a respondent, what should these circumstances be and what factors should the Commissioner consider?

3.20. No comment required.

Question 20: Is there anything else you consider the Regulations should cover or do you have any comments on the consultation?

3.21. There may be some respondents which receive regular complaints. Therefore, it would be useful for all businesses, and small businesses in particular, to have access to information about these complaints, in much the same way as consumers have access to sellers' information when purchasing goods from Amazon or eBay. AAT recommends publishing a list of respondents on the Commissioner's website with, for example, an analysis of the:

- total number of cases that have been taken on by the Commissioner
- number of cases in progress
- number of cases resolved reasonably (positive)
- number of cases concluded unreasonably from the Complainant's and Commissioner's perspective (negative).

3.22. This information would empower small businesses complainants and make transparent the sharp practices of a small number of large businesses.

4. About AAT

4.1. AAT is a professional accountancy body with approximately 50,000 full and fellow members and 80,000 student and affiliate members worldwide. Of the full and fellow members, there are over 4,250 licensed accountants who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.

4.2. 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.

5. Further information

If you have any questions or would like to discuss any of the points in more detail then please contact Aleem Islan, AAT Technical Consultation Manager, at:

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