



**Submission by the  
Commonwealth Ombudsman**

**THE AUSTRALIAN SMALL BUSINESS  
AND FAMILY ENTERPRISE BILL 2015**

**INQUIRY BY THE LEGAL AND CONSTITUTIONAL  
AFFAIRS LEGISLATION COMMITTEE**

Submission by the Acting Commonwealth Ombudsman, Richard Glenn

**July, 2015**

## INTRODUCTION AND SUMMARY

The Australian Small Business Commissioner (the Commissioner) currently plays an important role for small businesses and family enterprises in Australia by:

- providing information and assistance to small businesses, such as referral to dispute resolution services;
- representing small business interests and concerns to the Australian Government; and
- working with industry and government to promote a consistent and coordinated approach to small business matters.<sup>1</sup>

On 30 April 2014, the Government released a discussion paper (the Discussion Paper) on the proposal to transform the Commissioner into the Australian Small Business and Family Enterprise Ombudsman (the ASBFE Ombudsman). The key responsibilities of the proposed ASBFE Ombudsman were to include being a:

- concierge for dispute resolution;
- Commonwealth-wide advocate for small businesses and family enterprises;
- contributor to the development of small business friendly Commonwealth laws and regulations; and
- single-entry point agency through which Commonwealth assistance and information regarding small business can be accessed.

The Treasury sought input on the nature and scope of these four key responsibilities and also on how best to provide the ASBFE Ombudsman with appropriate powers to deliver benefits to Australian small businesses.

The Commonwealth Ombudsman made a submission in response to the Discussion Paper, giving in-principle support to the suggested enhancements to the Commissioner's role. However, we expressed strong concerns about the use of the title 'Ombudsman' in relation to the enhanced role, because one of the key responsibilities of the proposed ASBFE Ombudsman was to be advocacy. We also expressed concern about the potential for confusion regarding the respective roles of the Commonwealth Ombudsman and ASBFE Ombudsman, as well as concerns about possible duplication of effort in relation to complaint handling and reviews or audits relating to Australian Government agencies.

As part of the Treasury's consultation process, the Commonwealth Ombudsman provided additional comments on draft legislation to establish the ASBFE Ombudsman, highlighting specific matters that could be clarified to ensure that small businesses and family enterprises have their matters dealt with by the most appropriate government agency.

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 Bills) were introduced to Parliament on 3 June 2015. Since the development of the Discussion Paper, the remit of the proposed

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<sup>1</sup> Australian Small Business Commissioner website: <http://www.asbc.gov.au/about/our-role>

ASBFE Ombudsman was refined to include the following two key functions - an advocacy function, and an assistance function.<sup>2</sup>

The Bills were debated and passed by the House of Representatives on 17 June 2015. On 19 June 2015, the Senate referred the Bills to the Legal and Constitutional Affairs Legislation Committee for inquiry and report.

## BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Small businesses often contact the Commonwealth Ombudsman to complain about the administrative actions of Australian Government agencies such as the Australian Securities and Investments Commission, Australia Post and Australian Customs and Border Protection Service. Until 1 May 2015, the Commonwealth Ombudsman also received complaints from small businesses and family enterprises in relation to actions and decisions of the Australian Taxation Office (ATO)<sup>3</sup>.

The office of the Commonwealth Ombudsman carefully assesses all complaints received. If an investigation is conducted and the Commonwealth Ombudsman considers that the relevant agency's actions or decisions were wrong or unreasonable in all the circumstances, we can recommend that the agency take action to remedy the problem. The Commonwealth Ombudsman has limited power to investigate complaints about private individuals or companies<sup>4</sup>.

## RESPONSE TO THE BILLS

The Commonwealth Ombudsman notes that the Commissioner currently plays an important role in providing assistance to small businesses and family enterprises in

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<sup>2</sup> *Australian Small Business and Family Enterprise Ombudsman Bill 2015 and Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015 Explanatory Memorandum*, pp. 4-5.

<sup>3</sup> Since 1 May 2015, complaints about tax administration action taken by the ATO are handled by the Inspector-General of Taxation.

<sup>4</sup> The Commonwealth Ombudsman can investigate complaints about goods and services delivered by contractors for and on behalf of the Australian Government. In addition, the Postal Industry Ombudsman (PIO) can investigate complaints about companies registered with the PIO scheme and the Overseas Students Ombudsman can investigate complaints about registered private education providers.

Australia. The proposed enhancements to the Commissioner's role will allow it to build on its already impressive reputation as an advocate for small businesses and we support the substance of these enhancements.

However, we continue to be concerned about the use of the title 'Ombudsman' in relation to this role, as well as the potential for confusion regarding the respective roles of the Commonwealth Ombudsman and ASBFE Ombudsman.

## The Ombudsman title

The Commonwealth Ombudsman is greatly concerned about the proposal to change the title of the Commissioner to the ASBFE Ombudsman, as the ASBFE Ombudsman would not meet the set of criteria widely considered necessary in order to be described as an Ombudsman.

Use of the term Ombudsman in this context is therefore misleading and has the potential to damage the 'Ombudsman' brand that has been developed by Ombudsman offices throughout Australia over the last 40 years.

### 1. Accepted definition of 'Ombudsman'

The Australian and New Zealand Ombudsman Association (ANZOA), of which the Commonwealth Ombudsman is a member, is acknowledged as the peak body for Ombudsmen in Australia and New Zealand. In 2010, ANZOA released a policy statement outlining the essential criteria for describing a body as an Ombudsman in light of the globally accepted Ombudsman model and its 200 year history. In summary, ANZOA's policy is that a body must:

- be **independent** – an ombudsman must not be subject to direction, and must not be, or be able to be perceived to be, an advocate for any group;
- have a clearly defined **jurisdiction**;
- have sufficient **powers** to investigate matters within its jurisdiction, both in relation to individual complaints and systemic issues;
- be **accessible**;
- afford **procedural fairness** – the actions of the ombudsman must not give rise to a reasonable apprehension of partiality, bias, or prejudgment; and
- be **accountable**.

The Bills outline that the proposed ASBFE Ombudsman will have an advocacy function and an assistance function:

- Under the advocacy function, the ASBFE Ombudsman will, among other things, undertake research and inquiries into legislation, policies and practices affecting small businesses and family enterprises; and report and give advice to the Minister on those matters; and
- Under the assistance function, the ASBFE Ombudsman will respond to requests for assistance by an operator or a small business or family enterprise (including by referring requests to another agency); and may make recommendations about how the dispute may be managed.

The proposed responsibilities of the ASBFE Ombudsman suggest that while the ASBFE Ombudsman will have a role in relation to the handling of complaints from small businesses and family enterprises (i.e. as part of the assistance function), its true role seems to be centred on **advocacy** for the interests of small businesses and family enterprises. It is generally understood that the fundamental role of an Ombudsman is to receive and independently investigate complaints made by citizens or consumers, and a body that is largely concerned with advocacy for a particular group therefore cannot fall within the accepted definition of an Ombudsman. An independent and impartial Ombudsman cannot be an advocate for a complainant, Government, or a particular group or class of people.

While it is noted that the Explanatory Memorandum explains that the advocacy role of the ASBFE Ombudsman will be functionally separate from the ASBFE Ombudsman's other activities,<sup>5</sup> this is insufficient to cure the partiality that is inherent in adopting an advocacy role. If an Ombudsman takes on any advocacy role, it can undermine the trust of the parties in a dispute when accepting advice and recommendations from the Ombudsman and can more generally diminish the valuable role Ombudsmen play in addressing complaints and improving the standard of complaint handling as a whole.

Further, it is critical that an Ombudsman is seen to be independent, and true independence requires freedom from direction. It does not appear that the Bills provide for such independence in the case of the proposed ASBFE Ombudsman. For example, the Bills state:

- The Minister may give written directions to the ASBFE Ombudsman about the performance of the ASBFE Ombudsman's functions, and the ASBFE Ombudsman must comply with such directions;<sup>6</sup> and
- The Minister may direct the ASBFE Ombudsman to give the Minister specified reports relating to the Ombudsman's functions, and the ASBFE Ombudsman must comply with such directions.<sup>7</sup>

In the Commonwealth Ombudsman's opinion, the proposed functions of the ASBFE Ombudsman do not conclusively satisfy the fundamental requirements of an Ombudsman as defined by ANZOA and in this context, use of the term 'Ombudsman' would be misleading.

## **2. A broader definition of 'Ombudsman'?**

The Discussion Paper released in 2014 suggested that a 'broader definition of an ombudsman being a designated person who advocates for another lends itself to the Government's envisaged role for the [ASBFE Ombudsman]'.<sup>8</sup>

The Commonwealth Ombudsman is firmly of the view that a body should not be described as an Ombudsman unless it complies with the six essential criteria as identified by ANZOA.

The suggested stretching of the concept of Ombudsman has the potential to diminish the Australian public's confidence in the role and independence of the Ombudsman

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<sup>5</sup> *Australian Small Business and Family Enterprise Ombudsman Bill 2015 and Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015 Explanatory Memorandum*, para 10.86

<sup>6</sup> *Australian Small Business and Family Enterprise Ombudsman Bill 2015*, s20.

<sup>7</sup> *Ibid*, s21.

<sup>8</sup> *The Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p 7

institution as a whole. Over the last 40 years, all Australian jurisdictions have established an Ombudsman, and in more recent times, a number of private sector industry Ombudsmen have also been created. Successive governments in all jurisdictions have invested in the public perception of Ombudsmen, leading to positive recognition and high levels of trust in the 'Ombudsman' brand. This public perception is a critical element of the success of the Ombudsman offices and careful application of the Ombudsman name in the future will ensure that this is preserved.

The term is considered so valuable that some jurisdictions have taken legislative action to protect it. In New Zealand, for example, the *Ombudsmen Act 1975* (NZ) states under its 'Protection of Name' clause that:

*"No person, other than an Ombudsman appointed under this Act, may use the name "Ombudsman" in connection with any business, trade, or occupation, or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself out to be an Ombudsman expect pursuant to an Act or with the prior written consent of the Chief Ombudsman."*<sup>9</sup>

Based on these reasons, the Commonwealth Ombudsman cannot support the proposal to call the enhanced Commissioner the ASBFE Ombudsman. While it may be tempting to take advantage of the high levels of trust in the Ombudsman brand by attaching it to other policy initiatives, public respect for the independence, integrity and impartiality of Ombudsman offices is at risk if bodies that do not conform to the accepted model are inappropriately described as an Ombudsman.

### **3. Suggested alternatives to the 'Ombudsman' title**

We understand that the use of the Ombudsman title in this context is intended to reflect the stature of the enhanced role of the Commissioner, and to clearly establish a point of difference with the non-statutory Commissioner.

While the Commonwealth Ombudsman supports retaining the existing title of the Australian Small Business (and Family Enterprise) Commissioner, it is acknowledged that a new title may be helpful in signalling the change in the role of the Commissioner. We suggest that there are titles other than 'Ombudsman' that adequately give notice of this change, while also reflecting the stature of the role – for example:

- Australian Small Business and Family Enterprise Advocate,
- Australian Small Business and Family Enterprise Authority,
- National Centre for Small Businesses and Family Enterprises, or
- Agent-General of Small Business and Family Enterprise.

These titles are more compatible with the key functions of the enhanced Commissioner and also allow for a clearer demarcation between the role of the Commonwealth Ombudsman and the enhanced Commissioner.

### **Demarcation of roles**

In response to the Discussion Paper, the Commonwealth Ombudsman expressed concern regarding how the proposed ASBFE Ombudsman's remit would be defined in order to avoid duplicating existing services offered by the Commonwealth

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<sup>9</sup> *Ombudsman Act 1975* (NZ), s28A.

Ombudsman. Potential problems stemming from an unclear distinction between the role of the Commonwealth Ombudsman and the proposed ASBFE Ombudsman include:

- duplication of effort by the Commonwealth Ombudsman and ASBFE Ombudsman when determining which body should take carriage of a complaint and/or which body is best placed to conduct a systemic review of an Australian Government agency's practice which affects small business;
- duplication of effort by agencies subject to the jurisdiction of the Commonwealth Ombudsman and ASBFE Ombudsman in responding to enquiries and/or investigations;
- confusion for complainants regarding which dispute resolution service to use; and
- the possibility of 'jurisdiction shopping' when complainants are dissatisfied with the first response they receive.

In order to resolve the 'overlap' in jurisdiction between the Commonwealth Ombudsman and the ASBFE Ombudsman, the Bills state that the ASBFE Ombudsman will not duplicate the operations of other agencies,<sup>10</sup> and the effect of the Bill is that the ASBFE Ombudsman **must** transfer a complaint to the Commonwealth Ombudsman if:

- the ASBFE Ombudsman reasonably believes that the request could have been made to the Commonwealth Ombudsman, and
- the ASBFE Ombudsman reasonably believes that the request could be more conveniently or effectively dealt with by the Commonwealth Ombudsman, and
- the Commonwealth Ombudsman has the legal power to deal with the request.<sup>11</sup>

The operation of this provision will require close cooperation between the two offices to ensure duplication is avoided and small businesses receive seamless services. We look forward to working with the ASBFE Ombudsman on these issues.

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<sup>10</sup> Ibid, s3.

<sup>11</sup> *Australian Small Business and Family Enterprise Ombudsman Bill 2015*, s69.