



Australian Government
The Treasury

21 July, 2015

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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**

Thank you for inviting the Treasury to make a submission on the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (the main Bill) and the Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015.

The proposed legislation will fulfil the Government's election commitment to establish an Australian Small Business and Family Enterprise Ombudsman. Treasury undertook extensive consultations as part of its work in developing the draft legislation. A scoping paper was released to specific Commonwealth, state and territory officials in January 2014. The feedback from these officials was considered and taken into account in preparing a public discussion paper, which was released in April 2014. A series of face-to-face consultations were held concerning the discussion paper, and 53 submissions were received. Subsequently an exposure draft of the main Bill was released on 11 March 2015. Consultations continued over several weeks with stakeholders, and over 40 submissions were received.

I hope that this submission assists in the Committee's consideration of the Bill.

Yours sincerely

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

July 2015

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INTRODUCTION

The Treasury thanks the Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission on the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (the Main Bill) and the Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015 (Consequential and Transitional Bill).

The Bills will establish the Australian Small Business and Family Enterprise Ombudsman (Ombudsman). The Main Bill specifies the powers and functions of the Ombudsman, while the Consequential and Transitional Bill sets out how the proposed Ombudsman will interact with the Commonwealth Ombudsman and allows for the current Australian Small Business Commissioner (Commissioner) to hand over existing ongoing work to the new Ombudsman.

Treasury notes that the Selection of Bills Committee referred the Bills to the Legal and Constitutional Affairs Legislation Committee because:

The role and operation of the small business Ombudsman seem inconsistent with the operation of similar Ombudsman positions.

The new Ombudsman will have, in accordance with the Government's election commitment, and as detailed below, expanded functions and new powers, when compared with the current Commissioner.

ELECTION COMMITMENT

The Australian Government committed at the 2013 election to create a Small Business and Family Enterprise Ombudsman to be:

- a Commonwealth-wide advocate for smaller enterprises;
- a single entry-point agency to access Federal small business programmes and support;
- a contributor to making Commonwealth laws and regulations more small business friendly; and
- a 'conciierge' for dispute resolution, who will also have a dispute resolution service.

The single entry-point initiative will now form part of the single access point for business information, services and assistance, which is part of the Government's Digital Transformation Agenda. The Ombudsman, operating in a concierge role, will direct people to information about accessing Commonwealth small business and family enterprise programmes and support.

The current Commissioner is a contractor whose role is not underpinned by any legislation. The Commissioner's role, however, is limited by the Financial Framework (Supplementary Powers) Regulations 1997, to providing advocacy and representation for small business interests and concerns to the Australian Government. The Commissioner has no specific role in relation to family enterprises.

The new Ombudsman, by contrast, will be a statutory officer underpinned by legislation, with a clearly defined advocacy function, and also with an assistance function. The

Ombudsman will thus both advocate for, and provide assistance to, small businesses and family enterprises.

By working co-operatively with the Commonwealth Ombudsman, the state small business commissioners, other state and territory officials and peak industry bodies, the new Ombudsman will ensure that small businesses and family enterprises have their matters dealt with, conveniently and effectively, by the most appropriate agency. The new Ombudsman will therefore, as per the 2013 election commitment, refer people to, for example, state-based options, or, if the circumstances permit, the Ombudsman's own outsourced dispute resolution service to help resolve disputes involving Commonwealth agencies.

As stated in the Explanatory Memorandum to the Bill, there is no nationally harmonised system of small business laws and policy. The state small business commissioners' legislation is not uniform, moreover no small business commissioner exists in two states (and in the territories). The Bill is not meant to achieve a nationally harmonised system, but rather 'fill the gaps' where the Commonwealth Constitution allows this to happen. In particular the new Ombudsman aims to address issues which are currently beyond the reach of state officials, such as disputes between a small business and a Commonwealth Government agency and disputes involving interstate and international commerce.

CONSTITUTIONAL LIMITATIONS

The Commonwealth Constitution limits the functions of the new Ombudsman - and requires the Ombudsman to perform different functions from the state small business commissioners. The Ombudsman can perform functions only if a relevant Constitutional connection exists linking the functions to a specific head of Constitutional power. The Ombudsman, depending on the subject matter, might not have any role in relation to, for example, disputes involving two unincorporated businesses within the same state.

Treasury undertook considerable consultation on the Bills, including recently over several weeks in March-April 2015. Comments from stakeholders were considered and taken into account in drafting the Bills. Stakeholders considered that the proposed Ombudsman should neither duplicate, nor supplant, the existing roles of state officials. The Main Bill therefore, in several places (clauses 39, 54 and 78), specifically indicates that the Bill's powers cannot be exercised in a way that impairs the capacity of any state to exercise its state constitutional powers. Clause 79 of the Main Bill further provides that the Bill does not intend 'to exclude or limit the operation of any State or Territory law'.

AVOIDING DUPLICATION

In response to the suggestions of stakeholders, the Main Bill seeks to ensure that duplication of existing services is avoided. Indeed, the general policy underlying the Bill is that the Ombudsman, in performing functions under the Bill, must avoid duplication with Commonwealth, state or territory agencies, and instead work cooperatively, as far as is possible, with other agencies (clause 16). The Ombudsman's assistance functions, for example, can be performed only if a relevant Constitutional connection exists linking the functions to a specific head of power under the Constitution. Clause 65 of the Bill (relevant actions) provides this Constitutional connection. Clause 69, however, limits the assistance function of the Ombudsman to instances where a request for assistance does not fall within the remit of another official.

Under clause 69, the Ombudsman must transfer a request for assistance under the Bill if the Ombudsman 'reasonably believes' that the request can be 'more conveniently or effectively dealt with' by another agency. In determining whether a request should be transferred, the Ombudsman must consult with the other agency (subclause 69(3)). This is to ensure that duplication and overlap with other agencies is avoided, and disputes are dealt with appropriately by the Ombudsman, on a case-by-case basis, taking into account each request for assistance.

The Ombudsman, by working co-operatively with existing Commonwealth, state and territory agencies, will avoid duplicating the services of other agencies, and instead complement the services they provide. The term 'agency' in the Main Bill will cover many entities, including any entity that may be prescribed in Rules made under clause 8. Entities prescribed as 'agencies' in the Rules will be recognised as entities to which the Ombudsman may transfer matters as part of the Ombudsman's assistance function. The state small business commissioners may be listed under such Rules as agencies for the purposes of the Bill. The titles and functions of officials alter over time, and it is easier to amend rules to take account of such changes, rather than regulations or primary legislation.

The Consequential and Transitional Provisions Bill will amend the *Ombudsman Act 1976* so that matters can be transferred from the Commonwealth Ombudsman to the Australian Small Business and Family Enterprise Ombudsman. This, again, is to avoid duplication with the functions of other officials.

APPOINTMENT

The office of the Ombudsman will be a statutory office, and the Bill requires the appointment of the Ombudsman to be made 'by the Governor-General by written instrument' (clause 24). For the sake of convenience, the Ombudsman may tender his/her resignation to the Minister (clause 28).

There is a termination clause in the Main Bill (clause 30) which is standard for Commonwealth officials (for example: the Fair Work Ombudsman, the Inspector-General of Taxation, and the Commonwealth Ombudsman). This clause does not impinge on the independence of the Ombudsman.

INDEPENDENCE AND IMPARTIALITY OF THE OMBUDSMAN

The new Ombudsman will be a statutory office holder, in contrast to the current Commissioner who is engaged as a contractor. The statutory appointment process offers a clear indication of the independence of the Ombudsman.

Actions taken by Commonwealth agencies and officers, relating to small businesses or family enterprises, may be investigated by the new Ombudsman. In relation, however, to requests for assistance involving decisions of Commonwealth ministers, the Main Bill (clause 67) precludes the Ombudsman from being asked to review the actions taken by a minister in carrying out the agenda of the Government of the day. Requests regarding state and territory ministers and agencies would need to be referred to relevant state and territory officials.

Small businesses and family enterprises need to be confident that information provided to the Ombudsman, which may 'adversely affect' their interests, will not be released into the public domain. The Main Bill therefore has appropriate safeguards (clauses 56 and 58)

which allow the Minister to redact, or decline to publish, reports and advice produced by the Ombudsman, where it is not in the 'public interest' for such information to be released.

The Ombudsman's reporting requirements – annual, quarterly and *ad hoc* – are designed to ensure that the Minister receives regular information about the Ombudsman's work. The quarterly reporting requirement mirrors that in other legislation, such as section 60J of the *Competition and Consumer Act 2010*. Quarterly reports are required to be provided within 20 business days after the end of each quarter. The Ombudsman may include recommendations to the Minister in relation to any matter in such reports (clause 40 of the Main Bill). *Ad hoc* reporting, which is largely at the discretion of the Ombudsman, is appropriate for advising on matters of significance when they arise. The Ombudsman's annual reports, in line with usual requirements, will be tabled in the Parliament.

If a matter is referred to the Ombudsman for inquiry by the Minister, the Minister may direct the Ombudsman to hold hearings, and because the Ombudsman will operate in a transparent manner, such hearings will be held publicly – unless it is not in the 'public interest' (clause 46). Subsequently the Ombudsman must provide the Minister with a report on the inquiry (clause 55), and the Minister must table such reports in each House of Parliament – after deleting confidential information (clause 56). This function of the Ombudsman is similar to processes set out in the *Productivity Commission Act 1998* (for example, section 11).

MAIN FUNCTIONS – ADVOCACY AND ASSISTANCE

ADVOCACY

Part 3 of the Main Bill outlines the new Ombudsman's advocacy function. The Ombudsman will advocate for small businesses and family enterprises in relation to legislation, policies and practices (clause 35). The Ombudsman will also promote best practice (clause 64), to address the key concerns of small businesses and family enterprises as they interact with the public sector and larger corporations.

The advocacy function of the new Ombudsman will build on the role of the Small Business Commissioner, but also extend it. The Ombudsman, unlike the current Commissioner, will have the information-gathering powers to be able to investigate and make recommendations to the Government on the wide range of issues affecting small businesses and family enterprises.

ASSISTANCE

In addition to advocacy, the Ombudsman will also have a separate assistance function. Under this assistance function, people may approach the Ombudsman for assistance with any dispute or complaint. The Ombudsman, however, will not duplicate the functions of other officials, therefore the Ombudsman must transfer a request for assistance to another Commonwealth, state or territory agency, if that other agency could deal with the request more 'conveniently or effectively'. The Ombudsman's concierge role will thus see small businesses and family enterprises referred to appropriate existing agencies that can deal with their issues. It is important to note that the Ombudsman will not have the authority to reopen decisions taken by other agencies.

The assistance function will require the Ombudsman to give assistance in relation to relevant actions if requested to do so, via referring people through the concierge role to

other agencies, or to the Ombudsman's outsourced alternative dispute resolution service. Neither the Ombudsman, nor the Ombudsman's staff, will undertake any alternative dispute resolution process. This is because the Ombudsman will be a public advocate for small businesses and family enterprises, and therefore might not be perceived as independent in alternative dispute resolution processes involving them. An outsourced alternative dispute resolution process will give everyone confidence in the integrity of the process.

The Ombudsman will not be able to make binding decisions because the Ombudsman cannot exercise the judicial power of the Commonwealth. Seeking the assistance of the Ombudsman will not curtail the rights of people to take their matters to court. The alternative dispute resolution function is not about displacing judicial processes, but rather about providing a mechanism for parties to resolve their disputes by encouraging the participation in alternative dispute resolution.

USE OF INFORMATION

Unlawful disclosure of 'protected information' (defined in clause 80) may cause great harm to affected people, and it is appropriate that there should be penalties to deter unlawful disclosure. Part 5, Division 2 of the Main Bill, dealing with protected information, is therefore consistent with protecting individuals' privacy rights.

The provisions relating to confidential information in the Bill also ensure that a person's confidential information is protected (for example, subclause 53(2), regarding deleting confidential information from evidence or documents before making them public). Additionally, to protect people's reputations, decisions of the Ombudsman to publish the name of a party who refuses to engage in, or withdraws from, an alternative dispute resolution process, are reviewable by the Administrative Appeals Tribunal under clause 92.