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Ombudsmen: the leaders in independent resolution, redress and prevention of disputes

15 July 2015

Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

Proposed Australian Small Business and Family Enterprise 'Ombudsman' (ASBFEO)

ANZOA notes that on 18 June 2015, the Senate referred 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* to the Legal and Constitutional Affairs Legislation Committee (the Committee) for inquiry and report by 11 August 2015.

We appreciate the opportunity to provide a submission to the Committee addressing relevant issues.

A professional association, ANZOA is the peak body for Ombudsmen in Australia and New Zealand. One of ANZOA's objectives, listed among others at: <http://anzoa.com.au/about-anzoa.html>, is to 'promote the appropriate use of the title of Ombudsman in both the public and private sectors'.

At <http://anzoa.com.au/about-ombudsmen.html>, ANZOA tracks the evolution of the institution of Ombudsman and highlights its concerns about misuse of the term.

ANZOA has made two detailed submissions to the Government's consultation process on the proposed ASBFEO. Our previous submissions are attached to this correspondence for the information of the Committee.

ANZOA's continuing concerns with the proposed ASBFEO centre on:

- the use of the term Ombudsman for an office which is explicitly an advocate

An Ombudsman must not be an advocate for any special interest group, agency or company. While Ombudsman offices commonly draw on their experience in resolving disputes to provide assistance to complainants and organisations, and to contribute to public policy discussions and consultations, Ombudsmen do not advocate for any of the parties.

- the use of the term Ombudsman for an office which does not have dispute resolution as its core function

The fundamental role of an Ombudsman is independent resolution, redress and prevention of disputes. Ombudsmen specialise in dispute resolution — in particular through the receipt, investigation and resolution of citizen or consumer complaints. In the case of the proposed ASBFEO, the dispute resolution role is secondary in nature to the advocacy function.

On this basis, while ANZOA welcomes support for small businesses and family enterprises, ANZOA cannot support the use of the name 'Ombudsman' for the proposed ASBFEO. The office as proposed is not an Ombudsman and should not, in our view, be called one.

ANZOA strongly recommends that the name of the office reflect its primary role of advocating in the interests of small business and family enterprises and has suggested options of Small Business and Family Enterprise Commissioner or Small Business and Family Enterprise Advocate.

I would be very happy to discuss ANZOA's position on the proposed ASBFEO and may be contacted on 03 8600 8784 or by email at info@anzoa.com.au.

Yours sincerely

Simon Cohen
ANZOA Chair



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Ombudsmen: the leaders in independent resolution, redress and prevention of disputes

7 April 2015

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EXPOSURE DRAFT: AUSTRALIAN SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN BILL 2015

The Australian and New Zealand Ombudsman Association (ANZOA) is the peak body for Ombudsmen in Australia and New Zealand. This submission supplements ANZOA's submission of May 2014 to the Treasury's *Small Business and Family Enterprise Ombudsman Discussion Paper (April 2014)*.

ANZOA welcomes the support for small businesses and family enterprises proposed in the *Australian Small Business and Family Enterprise Ombudsman Bill* (the Bill). However, we cannot support the use of the name 'Ombudsman' for the proposed Small Business and Family Enterprise Ombudsman (SBFEO). The SBFEO is not an Ombudsman and should not, in our view, be called one.

We refer you to ANZOA's policy statement *Essential Criteria for describing a body as an Ombudsman*, published in 2010 (attached and on the ANZOA website www.anzoa.com.au). Drawing from that policy statement, the SBFEO is not an 'Ombudsman' for reasons including the following:

The fundamental role of an Ombudsman is independent resolution, redress and prevention of disputes.

Ombudsmen specialise in dispute resolution — in particular through the receipt, investigation and resolution of citizen or consumer complaints.

For the SBFEO, though, this dispute resolution (or assistance) role appears secondary in nature to the advocacy function. The dispute resolution function is primarily a concierge for complaints function. In addition, to the comparatively minor extent that the SBFEO is involved in dispute resolution, it is a role that is not to be conducted by the Ombudsman a delegate or a SBFEO staff member.

An Ombudsman must not be an advocate for any special interest group, agency or company.

While Ombudsman offices commonly draw on their experience in resolving disputes to provide assistance to complainants and organisations, and to contribute to public policy discussions and consultations, Ombudsmen do not advocate for any of the parties.

The primary function of the SBFEO as set out in the Bill though, is as an advocate for small business. This function includes the conduct of inquiries, the review of proposals and the provision of advice. It is

an important and valuable function. However, by conferral of this advocacy function, it is clear that the SBFEO cannot be an Ombudsman.

Ombudsmen are independent.

Ombudsman independence is a key attribute for effective dispute resolution, and is guaranteed through arrangements such as ensuring the Ombudsman is not subject to direction, is able to select her or his own staff, and has an unconditional right to make public reports.

In a number of areas, the Bill does not provide for these important matters. For example:

- the Bill provides for the Minister to give direction to the SBFEO, and also requires the SBFEO to comply with these directions
- the Bill provides for SBFEO staff and consultants to be made available by the Secretary of the Department, rather than selected by the SBFEO, and
- the Bill provides for the SBFEO to make reports to the Minister, which, in some circumstances, the Minister is not required to publish.

The proposed office is not an Ombudsman.

While the case for a small business advocate is clear, the proposed SBFEO is not an Ombudsman.

The risk of calling this proposed agency an Ombudsman is twofold:

- First, the use of the term 'Ombudsman' to describe the SBFEO may erode the community's trust in Ombudsmen and their function of complaint handling and dispute resolution generally.
- Second, those who deal with the SBFEO will be confused as to its role, as it will not conform to the usual practice of an Ombudsman.

We therefore strongly recommend that the name of this office reflect its primary role of advocating in the interests of small business and family enterprises. Options such as Small Business and Family Enterprise Commissioner or Advocate more accurately describe this proposed body.

Further information

Should you require any further information about the role of Ombudsman, or about this submission, please contact me on 03 8600 8784, or by email at info@anzoa.com.au.

Yours sincerely

Simon Cohen
ANZOA Chair



ESSENTIAL CRITERIA FOR DESCRIBING A BODY AS AN OMBUDSMAN

Policy statement endorsed by the Members of the Australian and New Zealand Ombudsman Association (ANZOA)

The institution of Ombudsman has proven itself adaptable to a variety of roles and settings.

In Australia and New Zealand today, there are several types of Ombudsman offices:

- Parliamentary Ombudsmen who take complaints from citizens and constituents about government agencies
- Other statutory Ombudsmen/Commissioners who investigate complaints about particular agencies or professional services—such as health
- Industry-based Ombudsmen who take complaints from customers of companies providing particular services—such as telecommunications, banking, insurance, investments, energy, water and public transport.

The development and popularity of the Ombudsman institution has come about for one reason—the office is renowned for independent, accessible and impartial review and investigation. In increasing numbers, the public turns to Ombudsman offices for assistance and support.

It is important, therefore, that members of the public are not confused about what to expect when they approach an Ombudsman's office—public trust must not be undermined.

Many of those who approach an Ombudsman feel vulnerable, wish to do so in confidence or make serious allegations or whistleblower complaints.

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 office.

It is a contradiction in terms, for example, to describe a body as an 'internal ombudsman' or to apply the description to a body that is subject to the direction of a government minister or industry body.

The Australian and New Zealand Ombudsman Association (ANZOA) is concerned to ensure appropriate use of the term Ombudsman. Our view is that a body should not be described as an Ombudsman unless it complies with six essential criteria addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability.



Independence

- The office of Ombudsman must be established—either by legislation or as an incorporated or accredited body—so that it is independent of the organisations being investigated.
- The person appointed as Ombudsman must be appointed for a fixed term—removable only for misconduct or incapacity according to a clearly defined process.
- The Ombudsman must not be subject to direction.
- The Ombudsman must be able to select his or her own staff.
- The Ombudsman must not be—or be able to be perceived as—an advocate for a special interest group, agency or company.
- The Ombudsman must have an unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.
- The Ombudsman’s office must operate on a not-for-profit basis.

Jurisdiction

- The jurisdiction of the Ombudsman should be clearly defined in legislation or in the document establishing the office.
- The jurisdiction should extend generally to the administrative actions or services of organisations falling within the Ombudsman’s jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction—subject only to the contrary ruling of a court.

Powers

- The Ombudsman must be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.
- In addition to investigating individual complaints, the Ombudsman must have the right to deal with systemic issues or commence an own motion investigation.
- There must be an obligation on organisations within the Ombudsman’s jurisdiction to respond to an Ombudsman question or request.
- The Ombudsman must have power to obtain information or to inspect the records of an organisation relevant to a complaint.
- The Ombudsman must have the discretion to choose the procedure for dealing with a complaint, including use of conciliation and other dispute resolution processes.

Accessibility

- A person must be able to approach the Ombudsman’s office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman’s investigation of a complaint.
- Complaints are generally investigated in private, unless there is reasonable justification for details of the investigation to be reported publicly by the Ombudsman—for example, in an annual report or on other public interest grounds.

Procedural fairness

The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness:

- The complainant, the organisation complained about and any person directly adversely affected by an Ombudsman’s decision or recommendation—or criticised by the Ombudsman in a report—must be given an opportunity to respond before the investigation is concluded.
- The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudgment.
- The Ombudsman must provide reasons for any decision, finding or recommendation to both the complainant and the organisation which is the subject of the complaint.

Accountability

- The Ombudsman must be required to publish an annual report on the work of the office.
- The Ombudsman must be responsible—if a Parliamentary Ombudsman, to the Parliament; if an Industry-based Ombudsman, to an independent board of industry and consumer representatives.



Clare Petre
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22 May 2014

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SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN DISCUSSION PAPER APRIL 2014

The Australian and New Zealand Ombudsman Association (ANZOA) is a professional association and the peak body for Ombudsmen in Australia and New Zealand.

ANZOA's membership includes Industry-based Ombudsmen, Parliamentary Ombudsmen and other statutory Ombudsmen.

ANZOA is taking the opportunity to make a formal submission to the Treasury's *Small Business and Family Enterprise Ombudsman Discussion Paper* of 30 April 2014. Our formal submission is attached. We would like the submission to be made public.

In summary, ANZOA welcomes the support for small businesses and family enterprises as outlined in the Discussion Paper. However, we submit that the proposed agency is not an Ombudsman and should not be called one.

For further information on the matters ANZOA has raised, please feel free to contact me directly on (02) 8218 5204 or through the ANZOA Secretariat at info@anzoa.com.au.

Yours sincerely

Clare Petre
Chair
Australian and New Zealand Ombudsman Association



**Submission by the
Australian and New Zealand Ombudsman Association
(ANZOA) (May 2014)**

**The Small Business and Family Enterprise
Ombudsman – Discussion Paper (April 2014)**

Introduction

The Australian and New Zealand Ombudsman Association (ANZOA) is a professional association and the peak body for Ombudsmen in Australia and New Zealand. ANZOA's membership includes Industry-based Ombudsmen, Parliamentary Ombudsmen and other statutory Ombudsmen. There is more information about ANZOA and the offices of its members at: www.anzoa.com.au

We appreciate the opportunity to comment on the proposed Small Business and Family Enterprise Ombudsman. We request that our submission be made public.

In summary, ANZOA welcomes the support for small businesses and family enterprises as outlined in the Discussion Paper. However, we submit that the proposed agency is not an Ombudsman and should not be called one.

Assistance to small business and family enterprise

ANZOA supports the aim outlined in the Discussion Paper of providing a voice for small business and family enterprise.

In our experience, small businesses are often at a disadvantage in resolving disputes, particularly where the dispute involves a large business/corporation or a government agency. Small businesses usually comprise an owner and a small number of staff, sometimes family members. They generally do not have access to in-house accountancy or legal advice, and if they have to seek this externally it is a considerable impost on their business.

The offices of the Ombudsmen who are ANZOA members already handle complaints raised by small businesses/family enterprises in a range of areas — including their dealings with government agencies and with telecommunications, financial services, energy and water corporations.

We also have very positive working relationships with existing Small Business Commissioners. To this end, the role clarity as between Ombudsmen and these Commissioners has been enhanced by each office being appropriately named.

Assistance with an appropriate title

ANZOA's submission is essentially in relation to the name of the proposed agency. As outlined in the Discussion Paper, the agency is to be an advocate for small business and family enterprise. As an advocate, it cannot be an Ombudsman.

ANZOA's view is that inappropriate use of the Ombudsman title will create confusion and false expectations for the small businesses and family enterprises the agency aims to assist. Misnaming also has the potential to damage broader community understanding of an Ombudsman's role. These outcomes would be to the detriment of both the new agency and Ombudsmen more generally.

Whether it's the small business/family enterprise or the large government agency/commercial enterprise, each party to a dispute will, quite rightly, have particular expectations of an Ombudsman — from their previous experience of external dispute resolution through an Ombudsman office, or through broader community understanding of how Ombudsmen operate. One of their most important expectations will be that the agency will be an independent arbiter/conciliator of disputes, not take sides or act as an advocate for one of the parties.

We therefore strongly suggest that the new agency be given a title which accurately reflects its aims and functions. Appropriate titles may include:

- Small Business and Family Enterprise Advocate
- Advocate for Small Business and Family Enterprise
- Commissioner for Small Business and Family Enterprise
- Small Business and Family Enterprise Commissioner
- Inspector General for Small Business and Family Enterprise.

Any of these titles would better reflect the role of the agency as envisaged by the Minister for Small Business, the Hon Bruce Billson MP, in his foreword to the discussion paper:

Small businesses need a voice to work through and raise matters of concern which are creating unnecessary barriers to doing business.

Distinguishing the Ombudsman model

ANZOA supports consumers having access to a range of dispute resolution mechanisms that are appropriate to the consumer context. However, it is crucial that Ombudsman offices are differentiated from other complaint handling and dispute resolution mechanisms.

Ombudsman is a particular model of alternative dispute resolution and one that has proven itself adaptable to a variety of roles and settings. With a history going back over 200 years, the Ombudsman model is well-known for independence from all parties in dispute and impartial review and investigation.

In 2010, ANZOA called for stronger controls on use of the term Ombudsman. It supported that call with a policy statement setting out six essential criteria, which the public are entitled to expect of any body that is described as an Ombudsman — independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

These *Essential criteria for describing a body as an Ombudsman* are included as Attachment 1. We note that they are quoted in the Discussion Paper and they are also published on ANZOA's website: www.anzoa.com.au

ANZOA's view is that a body should not be described as an Ombudsman unless it complies with these six essential criteria.

As ANZOA observed in 2010, where problems arise in an industry or an area of government services, the call for an Ombudsman commonly follows. This in itself is not a problem — indeed it is a testament to the high level of public respect for the independence, integrity and impartiality of Ombudsman offices. ANZOA's concern, then and today, lies with the increasing inappropriate use of the term Ombudsman to describe bodies that do not conform to, or show an understanding of, the accepted Ombudsman model and its 200 year history.

The term Ombudsman is understood by the public as signifying an independent office which primarily has a complaint handling and investigation function. The term does not refer to agencies with regulatory, disciplinary and/prosecutorial functions, or to agencies that provide limited advice or mediation services. And the term does not apply to an advocate — an Ombudsman is not an advocate and an agency which advocates for any particular party is not independent.

The concept of Ombudsman is being stretched and the confidence of the public in the role and independence of the Ombudsman institution is at risk of being undermined and diminished.

In his foreword to the Discussion Paper, Minister Billson states that:

... to make a real difference, the role needs real power and real teeth to drive change and to be a genuine independent advocate for small business ...

As an advocate to Government, the Ombudsman will also contribute to the development of Commonwealth laws and regulations ...

The reference to an advocacy role is emphasised in the responsibilities of the agency:

The Government has outlined the key responsibilities of the Ombudsman are to be a:

- *concierge for dispute resolution*
- *Commonwealth-wide advocate for small business 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 Discussion Paper quotes ANZOA's *Essential criteria for describing a body as an Ombudsman* as including:

- *Be independent (that is, an ombudsman must not be subject to direction, and must not be, or perceived to be, an advocate for any group).*

It is clear from the Discussion Paper that the role for the Small Business and Family Enterprise agency is as an advocate — both in reality and perception. As such, it does not meet the independence criterion outlined above. Again, this is no criticism of the proposal. ANZOA supports the aims of the proposal to assist small business and family enterprise, but strongly submits that it should be called something other than an Ombudsman.

Independence and impartiality are fundamental Ombudsman principles. If an Ombudsman takes on an advocacy role, it undermines the trust of the parties who are in dispute and the trust the wider community has in the institution of Ombudsman.

Conclusion

The assistance to small businesses and family enterprises as outlined in the Discussion Paper is welcome. However, ANZOA strongly submits that the role is not an Ombudsman and should not be called an Ombudsman. We request that consideration be given to another name for the agency, which better reflects its role as an advocate for the interests of small business and family enterprise.

Attachment 1

ANZOA's Essential Criteria for describing a body as an Ombudsman

1. Independence

- The office of Ombudsman must be established — either by legislation or as an incorporated or accredited body — so that it is independent of the organisations being investigated.
- The person appointed as Ombudsman must be appointed for a fixed term — removable only for misconduct or incapacity according to a clearly defined process.
- The Ombudsman must not be subject to direction.
- The Ombudsman must be able to select his or her own staff.
- The Ombudsman must not be — or be able to be perceived as — an advocate for a special interest group, agency or company.
- The Ombudsman must have an unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.
- The Ombudsman's office must operate on a not-for-profit basis.

2. Jurisdiction

- The jurisdiction of the Ombudsman should be clearly defined in legislation or in the document establishing the office.
- The jurisdiction should extend generally to the administrative actions or services of organisations falling within the Ombudsman's jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction — subject only to the contrary ruling of a court.

3. Powers

- The Ombudsman must be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.
- In addition to investigating individual complaints, the Ombudsman must have the right to deal with systemic issues or commence an own motion investigation.
- There must be an obligation on organisations within the Ombudsman's jurisdiction to respond to an Ombudsman question or request.
- The Ombudsman must have power to obtain information or to inspect the records of an organisation relevant to a complaint.
- The Ombudsman must have the discretion to choose the procedure for dealing with a complaint, including use of conciliation and other dispute resolution processes.

4. Accessibility

- A person must be able to approach the Ombudsman's office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman's investigation of a complaint.
- Complaints are generally investigated in private, unless there is reasonable justification for details of the investigation to be reported publicly by the Ombudsman — for example, in an annual report or on other public interest grounds.

5. Procedural fairness

The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness:

- The complainant, the organisation complained about and any person directly adversely affected by an Ombudsman's decision or recommendation — or criticised by the Ombudsman in a report — must be given an opportunity to respond before the investigation is concluded.
- The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudice.
- The Ombudsman must provide reasons for any decision, finding or recommendation to both the complainant and the organisation which is the subject of the complaint.

6. Accountability

- The Ombudsman must be required to publish an annual report on the work of the office.
- The Ombudsman must be responsible — if a Parliamentary Ombudsman, to the Parliament; if an Industry-based Ombudsman, to an independent board of industry and consumer representatives.