



Minister for Small Business

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Australian Small Business and Family Enterprise Bill 2015

I refer to the Committee's letter of 18 June 2015 concerning the above Bill. I thank the Committee for its interest in the Bill, and I provide the following response to the Committee's comments.

Merits review – Subclause 92(2)

The merits review subclause in 92(2) of the Bill allows parties to appeal a decision made by the Ombudsman, under subparagraphs 41(3)(a)(ii), 56(3)(a)(ii), 58(3)(a)(ii) and 63(3)(a)(ii), regarding whether it is in the public interest to delete information, a recommendation or an opinion from a report or advice before it is tabled or published. Appeals relate only to the public interest element in these subparagraphs, and not to whether the relevant information or recommendation would be 'likely to adversely affect the interests of any persons'. This latter issue is an objective matter, and therefore subject to administrative decisions judicial review (ADJR).

Undue trespass on personal rights and liberties – Subclauses 48(3), 82(2) and 91(5)

The imposition of an evidential burden on the defendant in the circumstances specified in subclauses 48(3), 82(2) and 91(5) of the Bill is appropriate. In accordance with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the matters to which these subclauses relate, are matters readily within the knowledge of the defendant, and might not always readily be known to the Ombudsman – such as, for example, where a person discloses protected information in accordance with 'a law of a State or a Territory' (subparagraph 82(2)(b)(ii)).

An evidential burden placed on the defendant is not uncommon. Similar notations to those in the current Bill exist in other Commonwealth legislation (for example, see subsection 186N(2), *Bankruptcy Act 1966* – where a person has an evidential burden regarding having a 'reasonable excuse' for not returning a certificate of registration as a debt agreement administrator).

Subclause 48(3) of the Bill (whether or not a person is excused or released from attending a hearing), requires a person to simply produce a copy of something which would show that the person was excused from attendance a hearing, and there is a relatively low penalty for failing to meet this requirement.

Subclause 82(2) (whether an exception to the offence of disclosing or using protected information applies) requires a person to simply indicate a provision in legislation which authorised the person's disclosure or use of protected information.

Subclause 91(5) (an exception to secondary disclosure or use of protected information) requires that a person, who disclosed or used protected information, provides something which indicates that the disclosure for use was with the consent of the Ombudsman, or was for the purpose of enforcing certain laws.

The evidential burden in each of these circumstances can easily be met. In these circumstances, therefore, the imposition of an evidential burden on the defendant is reasonable.

Privacy – Part 5, Division 2

Part 5, Division 2 in the Bill will ensure accountability and transparency in relation to the use or disclosure of protected information. Following extensive consultations with stakeholders, this Division takes into account the need for individual rights under privacy laws to be protected, and includes strict penalties for a person assisting a small business or family enterprise, and a professional disciplinary body, if they handle protected information in a way that is inappropriate.

As stated in the explanatory memorandum to the Bill, the Ombudsman's ability to make information publicly available is an important part of having an Ombudsman with 'real power' consistent with the Government's election commitment, however, this objective has been balanced in the Bill with the need to ensure that protected information is handled appropriately. Public officials must be accountable for their actions – including what they do with 'protected information'. Unlawful disclosure of such information may cause great harm to some people, and it is appropriate that there should be penalties to deter unlawful disclosure. Exceptions to these provisions are also in place to provide people with a defence if, for example, they are able to show that the protected information was used for a proper purpose.

In these circumstances, the provisions dealing with protected information are consistent with individuals' privacy rights. Indeed, for the protection of privacy, the decisions of the Ombudsman in relation to certain information are reviewable by the Administrative Appeals Tribunal under section 92 of the Bill. Also, safeguards are in place, for example, individual rights and protections in relation to self-incrimination and legal professional privilege will be maintained under the Bill (clause 93).

Delegation of legislative power – Clause 96

I note the Committee's view concerning the delegation of legislative powers, however, no amendment to this provision is necessary. The provision is consistent with existing standard form provisions, which are present in other legislation, such as that relating to the Inspector-General of Taxation who will, like the proposed Ombudsman, be interacting with other Commonwealth officials, such as the Commonwealth Ombudsman, to deal with issues raised by small businesses. I note that the Committee, when it examined amendments to the Inspector-General of Taxation's legislation on 11 February 2015, did not comment on the similar provision existing in the Inspector-General legislation.

As the Committee noted in one of its regular reports, the recently revised Drafting Direction 3.8 is 'a policy statement and not a mandatory requirement'. Clause 96 of the Bill, moreover, does not deal with any 'significant provisions' relevant to Drafting Direction 3.8.

The Bill will establish an Ombudsman who can advocate for small businesses and family enterprises and provide assistance to them. The Bill is therefore concerned with supporting the rights of those who run small businesses and family enterprises. The Bill will not be a mechanism by which businesspeople, for example, are arrested or detained. It is therefore both practical and desirable for the Bill to use the proposed standard form provision for the delegation of legislative powers.

Additionally, the Bill does not limit the ability of Parliament (and the public in general) to understand and effectively scrutinise rules made under the Bill. Any rule made under this provision is a legislative instrument within the meaning of the *Legislative Instruments Act 2003*, and thus would be tabled in Parliament and be subject to disallowance. Legislative instruments are further scrutinised by the Senate Standing Committee for Regulations and Ordinances, which considers and reports on all instruments that come before it, to ensure that they are in accordance with appropriate exercises of delegated legislative power.

Subsection 17(1) of the Legislative Instruments Act also requires a rule-maker, to be satisfied that appropriate consultation has been undertaken before the person makes a legislative instrument. This requirement applies to all legislative instruments, but is particularly important if the instrument is likely to have an 'effect on business'. Small business legislative instruments will, of course, have some effect on businesses, and therefore must be publicly consulted on.

I thank the Committee again for its interest in this important measure. I note that the Bill was passed by the House of Representatives on 17 June 2015, and has now been referred to the Senate Legal and Constitutional Affairs Legislation Committee, which is expected to report on the Bill by 11 August 2015. I shall forward a copy of this letter to that Committee for its information.

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

Yours sincerely

BRUCE BILLSON