



## Minister for Small Business

Senator the Hon Ian Macdonald  
Chair  
Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Senator Macdonald

### AUSTRALIAN SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN

I welcome the Legal and Constitutional Affairs Legislation Committee's inquiry into the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (the Bill), and the Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015 (the Consequential and Transitional Provisions Bill). These Bills will together establish the Australian Small Business and Family Enterprise Ombudsman (Ombudsman) to assist the small business and family enterprise sector.

This Ombudsman is an important Government initiative to assist small businesses and family enterprises in Australia. It recognises the value to be gained from an advocate who can independently inform Government policy processes as they relate to small business, and further acknowledges the valuable role that alternative dispute resolution can play in resolving disputes in a practical, low cost and timely fashion.

I acknowledge that the Ombudsman is a new role, and that the Committee may not be fully aware of the extensive policy development process, including public consultation, undertaken to date. I note that the Committee has set a closing date for submissions of 17 July, and the Small Business policy area of Treasury will be making a submission to the Committee before that date. In the interim I provide the following comments to assist the Committee in its work.

The current Australian Small Business Commissioner (the Commissioner), Mr Mark Brennan, has done a great job in laying the groundwork for the Ombudsman. Mr Brennan is a contractor, who began his contracted term on 2 January 2013. His position is not underpinned by any legislation, and his role, under the Financial Framework (Supplementary Powers) Regulations 1997, is solely:

to provide advocacy and representation for small business interests and concerns to the Australian Government

The new Ombudsman, by contrast, will be a statutory officer underpinned by legislation, who will have a clearly defined assistance function, but will also have an advocacy function, plus associated statutorily defined powers.

The creation of the Ombudsman will not terminate the contract of the current Commissioner, and the time needed to recruit the new Ombudsman means that there will be some overlap between the current Commissioner's contract and the term of the new Ombudsman. This overlap will be used to allow the excellent ongoing work of Mr Brennan to be transferred in an orderly manner to the new Ombudsman (as per schedule 2 of the Consequential and Transitional Provisions Bill).

Permanent staff in the Commissioner's Office are Treasury officers (there are also some IT contractors engaged by Treasury). The status of these persons will be unaffected by the creation of the new Ombudsman.

The Australian Government committed at the 2013 election to transform the role of the current Australian Small Business Commissioner into one with 'real power', by creating a Small Business and Family Enterprise Ombudsman who will be:

- a Commonwealth-wide advocate for smaller enterprises;
- a contributor to making Commonwealth laws and regulations more small business friendly; and
- a 'concierge' for dispute resolution, who will also have a dispute resolution service.

The Ombudsman will be appointed, for a period of up to five years, by the Governor-General – something which indicates the importance the Government attaches to this new statutory office. The Ombudsman, for the sake of convenience, may resign in writing to the Minister (clause 28). In addition, the Ombudsman's appointment may be terminated by the Minister for reasons cited in clause 30. These reasons are identical to the reasons stated in other termination clauses in Commonwealth legislation – such as the *Ombudsman Act 1976*, which deals with the Commonwealth Ombudsman. The Commonwealth Ombudsman's appointment, like the new Ombudsman's appointment, may be terminated if the Commonwealth Ombudsman becomes bankrupt, compounds with his or her creditors, is absent without leave from work for 'for 14 consecutive days or for 28 days in any 12 months', etc. The termination clause in the Bill does not impinge on the independence of the Ombudsman, since the reasons for termination are very specific.

The new Ombudsman must operate within the constraints of the Commonwealth Constitution. The Constitutional underpinnings for the Ombudsman's advocacy functions are set out in clause 35 of the Bill, and those for the assistance function are in clause 65. The constitutional arrangements in the Australian Federation limit the interactions a Commonwealth official may have with state ministers and state agencies (see clause 67 of the Bill). Many state officials, moreover, such as the state small business commissioners, are doing splendid work, and it would be a waste of public money to attempt to duplicate their activities. For these reasons the Ombudsman will, in many instances, act as a concierge and direct small businesspeople to more appropriate state/territory officials or, for that matter, to more appropriate Commonwealth officials, where those other officials can deal 'more conveniently or effectively' with the requests being made (see clause 69 of the Bill).

The Bill recognises the value of alternative dispute resolution in providing timely and appropriate access to justice remedies for small business. The Commonwealth Constitution reserves judicial decisions to the Federal Court system. Binding decisions have a judicial character and, as the Ombudsman will not be part of the Federal Court system, the Ombudsman's outsourced alternative dispute resolution service will not make binding decisions. This, of course, in no way detracts from alternative dispute resolution being an effective and practical access-to-justice remedy for small business and family enterprises. Also, seeking the assistance of the Ombudsman's service will not curtail the rights of people to subsequently take their matters to Court. The Bill is about assisting dispute resolution, not about displacing judicial processes where those processes are more appropriate.

The Ombudsman, like the current Commissioner, will have an advocacy function. The Ombudsman's expanded advocacy role will be vital for fixing systemic national problems that inhibit the functioning of small businesses and family enterprises. Unlike the current Commissioner, the Ombudsman will also

have an assistance function. Government – Commonwealth/state/territory – often appears as a labyrinth to small businesses and family enterprises. The Ombudsman will assist them to seek assistance from the most appropriate official. The Bill therefore strives to avoid the situation where a business with a concern seeks assistance from several agencies in turn – without anything being resolved. The Bill will ensure that matters are dealt with in the most convenient and effective manner, by the most appropriate Commonwealth/state/territory agency. The Bill will thus prevent forum shopping and ensure that the Ombudsman will complement the roles of existing officials – not duplicate them. One area where the Ombudsman will clearly complement existing services, is in relation to matters concerning interstate and international commerce – which, under constitutional arrangements, no state/territory official can effectively deal with.

As I have stated in the Parliament, when a small business is involved in a commercial dispute with a big business, the small business often loses out – regardless of the merits of the case. The new Ombudsman therefore will be able to refer small businesses to an existing alternative dispute resolution service run by another agency, or to the Ombudsman's own outsourced alternative dispute resolution service. Such services will help resolve disputes fairly, and get people back to business quickly.

Impartiality must also be intrinsic to the Ombudsman, and the Bill has been prepared with this in mind. It is for this reason that the advocacy and assistance functions are completely separate, since an Ombudsman who advocates a position regarding a particular issue would not be perceived as impartial in dealing with disputes relating to that issue. This is why, as per clause 73 of the Bill, neither the Ombudsman nor the Ombudsman's staff will conduct any alternative dispute resolution process, but will instead, where relevant, will refer businesses in dispute to an outsourced alternative dispute resolution service.

In relation to requests for assistance involving decisions of Commonwealth ministers, the Bill understandably precludes the Ombudsman from being asked to review actions taken by ministers in carrying out the agenda of the government of the day (see clause 67). Actions taken by Commonwealth agencies and officers, however, could be investigated by this Ombudsman, for example, a small business or family enterprise could be assisted by the Ombudsman if it were in dispute with a Commonwealth department or agency.

The Bills were prepared after extensive consultations with stakeholders, including the state small business commissioners. On the basis of feedback from the commissioners, a power to name persons who refuse to engage in a recommended alternative dispute resolution process, or withdraw from it, was included in the Bill (clause 74). This power is very specific. It, for example, cannot be used to publicly upbraid an entity for its business dealings, rather it can only be used to declare that someone either did not engage, or withdrew from, alternative dispute resolution. The Victorian Small Business Commissioner was given such a power only last year, and feedback indicates that the mere existence of such a power is effective in encouraging parties to participate in recommended alternative dispute resolution processes.

Questions have been raised regarding the Ombudsman being given statutory immunity. It would be most unusual for a Commonwealth official to be granted any sort of comprehensive immunity. Commonwealth officials should be accountable for their actions. Where the Ombudsman acts within the boundaries of the Ombudsman's remit under the Bill, the Ombudsman would have no need for immunity. It would not be appropriate, or even possible, to give an official immunity to act outside that official's remit.

I note that the reason for the referral to the Committee was that 'The role and operation of the small business Ombudsman seem inconsistent with the operation of similar Ombudsman positions.' No two ombudsmen are identical, and as for the use of the title 'Ombudsman', it was chosen because the new

Ombudsman will differ considerably from the current Commissioner – in terms of having expanded functions and powers.

The Bill also addresses issues raised by the Senate Economic Legislation Committee in response to the Greens private member's Small Business Commissioner Bill 2013 (2013 Bill). The 2013 Bill sought to address criticism that the Australian Small Business Commissioner did not have any real power. The new Ombudsman will have 'real power'. The 2013 Bill was itself criticised for not adequately addressing the issue of duplicating the roles of the state small business commissioners. The present Bill goes to considerable lengths to address the relationship between Commonwealth and state laws (see, for example, clauses 39, 54, 78, and 79), to ensure that duplication of existing services is avoided.

For your information I also attach a copy of my letter to the Senate Scrutiny of Bills Committee, which asked for clarification of certain matters in the Bill.

Yours sincerely,

 **BRUCE BILLSON**