



Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

[legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary,

**RE: 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 giving the Office of the NSW Small Business Commissioner (OSBC) the opportunity to comment on the *Australian Small Business and Family Enterprise Ombudsman Bill 2015* (the Bill) and the *Consequential Transitional Provisions Bill 2015*.

Enhancement of the existing Australian Small Business Commissioner (ASBC) role represents a positive opportunity to develop the framework for a highly regarded advocate who can act as a conduit to, and representative for, small business issues at the Federal level. The OSBC does hold concerns however that the legislation is overly prescriptive and onerous which goes against the Commonwealth Government's overarching objective of reducing red tape.

The OSBC was established to advocate on behalf of small businesses in NSW and support small businesses by:

- providing dispute resolution services,
- delivering quality business advice through Small Biz Connect, and
- speaking up for small business within government.

The establishment of the OSBC and the role of the Commissioner was formalised when the *Small Business Commissioner Act 2013* (the SBC Act) commenced on 18 September 2013. This Act evens out the playing field for small businesses in NSW.

I have considered the Bills and Explanatory Memorandum in close detail and have attached a table at **TAB A** which sets out the OSBC's comments on specific provisions in the Bill. More broadly however the OSBC has several key concerns about the drafting of the Bill which warrant additional reference below.

**Operational implications of the Bill**

In its current form the Bill is unclear about how referrals between the Ombudsman and the States and Territories will occur in practice and in what instances a conflict will occur with legislation of the States and Territories. The OSBC has concerns about whether the level of service able to be offered to small businesses by other Commonwealth and State-based agencies may be diminished if matters which fall within s35 and s65 of the Bill are not able to be handled expeditiously by that agency due to the fact that the matter may need to first be referred to the Ombudsman.

The Bill is confusing for small businesses or their representatives trying to ascertain whether they should go to a State-based Commissioner for assistance or the Ombudsman. Such a scenario is

Level 43, MLC Centre, 19 Martin Place, Sydney NSW 2000. GPO Box 5477, Sydney NSW 2001  
Phone: (61 2) 8222 4800 Fax: (61 2) 8222 4816 Email: [we.assist@smallbusiness.nsw.gov.au](mailto:we.assist@smallbusiness.nsw.gov.au)

[www.smallbusiness.nsw.gov.au](http://www.smallbusiness.nsw.gov.au)

ABN 72 189 919 072



of concern to the OSBC particularly given the Bill does not address the ambiguities about how such a situation will be managed.

Advice received from the NSW Crown Solicitor's Office (CSO) is that the Ombudsman would have concurrent, not exclusive legislative power with respect to those matters that have some territorial connection to NSW. There is a concern about the ambiguity that a small business or their representative may face about which body is best placed to deal with their matter. Consequently it is critical that these issues are addressed in a Memorandum of Understanding unless improved clarity can be included in the Bill. This gives scope for delays and abuse of process.

### **Express reference to Small Business Commissioners**

The OSBC notes that the definition of an "agency" at s8 of the Bill has been amended to allow the Minister to prescribe bodies as agencies for the purposes of the Bill. This is critical to ensure that parties reading the legislation understand that State-based Small Business Commissioners, which deliver very similar services to that of the Ombudsman, are captured under this definition. This is of key importance given there is a need to ensure that roles and responsibilities are not duplicated between the Ombudsman and the Commissioners. This will similarly assist in addressing confusion and ambiguity regarding key referral bodies.

### **Independence of the Ombudsman**

The OSBC queries whether the level of direction able to be given to the Ombudsman from the Minister aligns with the references in the Explanatory Memorandum to the objective of impartiality. If the Ombudsman is truly going to be able to make credible inquiries into the concerns of small businesses and family enterprises arising out of legislation, policies and practices, the Ombudsman needs to have the certainty that the Minister will not alter any findings or recommendations made by the Ombudsman. In its current form the provisions in the Bill diminish the Ombudsman's independence from the Government of the day and risk limiting the Ombudsman's ability to be non-partisan.

For the OSBC's comments on the Bill more broadly please see the commentary at **TAB A**.

Thank you for the opportunity to comment. Should you wish to discuss any of the issues raised in this submission further please contact \_\_\_\_\_ Principal Advocacy Advisor, on  
or \_\_\_\_\_

Yours sincerely )

**Robyn Hobbs OAM**  
**NSW Small Business Commissioner**

22 July 2015

TAB A

Provision	Comments	Recommendations
<p><b>s5 Meaning of a small business</b></p>	<p>The current definition is too prescriptive and is overly complicated. Of particular concern is the need to 'take part-time staff into account as an appropriate fraction' as per s5(3) when determining whether a business meets the definition of a 'small business' under the Bill. What will occur in the instance that a small business has both casual and part-time employees? How are casual employees calculated?</p> <p>Will staff in the Ombudsman's office be required to ask businesses for evidence of turnover and staff numbers in order to ascertain whether a business meets the requirements of the definition? If so this will have resourcing implications for the office and place an unnecessary regulatory burden on businesses seeking assistance.</p>	<p>Full-time, part-time and casual staff should each be counted as 1 FTE.</p> <p>No evidence should be required.</p>
<p><b>s8 Meaning of agency of the Commonwealth, a State or a Territory</b></p>	<p>The OSBC notes that the definition of an agency at s8 of the main Bill has been altered to allow the Minister to prescribe bodies as agencies for the purposes of the Bill.</p> <p>This is critical to ensure that parties reading the legislation understand that State-based Small Business Commissioners, which deliver very similar services to that of the Ombudsman, are captured under this definition. This is of key importance given there is a need to ensure that roles and responsibilities are not duplicated between the Ombudsman and the Commissioners.</p>	<p>Amendment noted.</p>
<p><b>s14 The Advocacy function (e) to work cooperatively, as far as is possible, with the appropriate agencies of the Commonwealth, States and Territories...</b></p>	<p>The language "as far as is possible" doesn't give a clear directive that cooperation should be a key priority. This phrase is also used at s16(c); s59 and s70 with regards to cooperation.</p>	<p>The phrase "as far as is possible" should be carved out from the Bill.</p>
<p><b>Independence of the Ombudsman</b> <b>s20 Directions from the Minister</b>  <b>s41(3)(a)(b) Ombudsman report</b></p>	<p>The OSBC queries whether the level of direction able to be given to the Ombudsman from the Minister aligns with the references in the Explanatory Memorandum to the objective of impartiality.</p> <p>The OSBC queries the rigour of the provisions which allow the Ombudsman to publish reports. This is namely due to the fact that</p>	<p>The OSBC recommends that the Commonwealth could consider</p>

<p><b>s56(3)(a)(b) Report on an inquiry</b></p> <p><b>s63(3)(a)(b) Advice to the Minister</b></p>	<p>the Minister has the ability to delete any information contained in these reports if: (a)(i) the information or recommendation would be likely to adversely affect the interests of any person; and (ii) the Minister reasonably believes that it is in the public interest to delete the information or recommendation; and (b) must delete from the report any confidential information.</p> <p>If the Ombudsman is truly going to be able to make credible inquiries into the concerns of small businesses and family enterprises arising out of legislation, policies and practices, the Ombudsman needs to have the certainty that the Minister will not alter any findings or recommendations made by the Ombudsman.</p> <p>In its current form these provisions diminish the Ombudsman's independence from the Government of the day and risk limiting the Ombudsman's ability to be non-partisan.</p> <p>What is the objective of provisions s58 and s63(i) by which the Minister may publish the Ombudsman's advice? Such a provision may be a disincentive to the Ombudsman from providing frank and independent advice.</p>	<p>amending s41(3); s56(3); and s63(3) of the Bill to include provisions similar to that of s27 of the <i>Small Business Commissioner Act 2013 (NSW)</i> which requires the NSW Small Business Commissioner to give the Minister the opportunity to make submissions in relation to the draft report, however the Commissioner is not required to amend the draft report in light of any submissions made by the Minister. The report instead must indicate that any such objection has been made.</p> <p>Provisions should be included which outline in what circumstances the Ombudsman's advice would or would not be made public.</p>
<p><b>s35 Relevant legislation, policies and practices</b></p> <p><b>s64 Promoting best practice</b></p> <p><b>s65 Relevant action</b></p> <p>(c) action by a <b>constitutional corporation</b> that affects a small business</p> <p>(d) action by any entity that affects a small business that is a <b>constitutional corporation</b></p> <p>(e) <b>trade or commerce:</b> (ii) among states</p>	<p>The items listed as falling within the remit of the Ombudsman at s35; s64 and s65, overlap significantly with the matters dealt with by the OSBC.</p> <p>Advice received from the NSW Crown Solicitor's Office (CSO) is that the Ombudsman would have <u>concurrent</u>, not exclusive legislative power with respect to those matters that have some territorial connection to NSW. There is a concern about the ambiguity that a small business or their representative may face about which body is best placed to deal with their matter. Consequently it is critical that these issues are addressed in a Memorandum of Understanding unless improved clarity can be included into the Bill.</p>	<p>More detail is required in the Bill (or at a minimum in a Memorandum of Understanding) which addresses how such circumstances would be dealt with operationally in practice.</p>

<p>(iii) between states</p> <p>(f) (i) insurance                  (ii) banking                  (iii) telecommunications                  (iv) copyright, patents, designs, trademarks</p>		
<p><b>Penalty value</b></p>	<p>The OSBC queries whether the penalty value used is an adequate deterrent for parties that may breach relevant provisions in the Bill. When the current penalty unit of \$170 is applied the 30 penalty units provided for in the Bill, this equates to a penalty of \$5,100 in total.</p> <p>The Ombudsman may find itself in a position whereby parties in breach of the Bill may opt to pay what is a relatively minimal penalty, as opposed to adhering to the Ombudsman's requests. For example a summons to attend a hearing as per s48 or refusal to answer a question or produce a document s49.</p>	<p>It is recommended that a two-tiered approach be used for penalty units in the Bill. That is one for individuals and one for corporations. For example in s18(2) of the <i>Small Business Commissioners Act 2013 (NSW)</i> 100 penalty units apply to a corporation or 50 penalty units in the case of an individual.</p> <p>The Commonwealth Treasury indicated that the above recommendation is already the case, however there is no reference to such a two-tiered system at any stage in the Bill.</p>
<p><b>Reporting</b></p> <p><b>s40 Quarterly reports to the Minister</b></p> <p><b>s23 Annual report</b></p>	<p>The requirement for the Ombudsman to submit a report to the Minister each quarter (s40) in addition to the level of detail required under the annual reporting obligations (s23) pose a significant and onerous administrative burden on the Ombudsman's office.</p> <p>These reporting obligations will require significant resourcing to ensure that an IT platform is available to report on these measures, in addition to the time expended collecting such information. Consequently it will be important to ensure that the time spent developing such reports does not outweigh the time spent providing assistance to small businesses.</p>	<p>An assessment should be made as to whether the Ombudsman's office will have adequate resourcing to report on such items.</p>
<p><b>s69 Circumstances where the Ombudsman must transfer a</b></p>	<p>s69 does not expressly require consent and agreement from a Commonwealth or State agency before a matter is referred to</p>	<p>A provision needs to be inserted which requires that consent and agreement is</p>

<p><b>request for assistance to another agency</b></p>	<p>them, instead only consultation is required. This is of concern to the OSBC.</p> <p>s69 regularly uses the phrase 'more conveniently or effectively' this is a vague phrase which creates unnecessary ambiguity. It is recommended that this phrase be carved out from the Bill.</p> <p>The Bill doesn't reference any requirement for the Ombudsman to gain authorisation from the small business before a matter is referred to another agency. Such a process is of great importance in order to ensure that the small business' confidentiality is maintained where appropriate.</p>	<p>gained from a Commonwealth or State agency before a matter is able to be referred by the Ombudsman.</p> <p>Remove the phrase 'more conveniently and effectively'</p> <p>Authorisation must be gained from the small business before a matter is referred.</p>
<p><b>s71(5) &amp; s74 Publishing the names of parties that don't partake or choose to withdraw from the ADR process recommended</b></p>	<p>What objective is this provision seeking to achieve?</p> <p>The risk that the Ombudsman might publish the names of parties that do not partake or choose to withdraw from the ADR process may limit parties possible future participation with the Ombudsman's office as a result of such a heavy handed approach. This may similarly be a disincentive for small businesses seeking assistance from the Ombudsman due to confidentiality concerns.</p> <p>This provision insinuates that there will be an expectation that the Ombudsman's office will track the course of action taken by parties. Consideration needs to be given to how this will happen in practice if the Ombudsman's office is not managing the ADR process internally.</p>	<p>It is recommended that this provision be removed.</p>
<p><b>s72 List of ADR providers</b> <b>s73(1)(2) Parties to a dispute to decide who the mediator is.</b></p>	<p>Under Division 3 of the Bill the Ombudsman is not able to recommend the ADR provider that the parties to a dispute should use. Consequently, how will the parties to the dispute decide upon the mediator that they will use in practice? In the OSBC's experience, an independent third-party, in this case the OSBC, is effectively able to broker and coordinate such a decision.</p> <p>The Bill does not enable the Ombudsman to monitor the quality of the list of mediator's services nor the prices charged. This level of oversight is necessary in order to ensure that the quality and</p>	<p>The cost of mediation is unclear in the Bill. If the Ombudsman takes a low-cost approach and decides to not subsidise mediation in any form, small businesses may find themselves in a situation whereby they are unable to utilise the Ombudsman's mediation services due to prohibitive costs.</p>

	<p>standard of ADR services is of the highest possible standard.</p> <p>s73 does not link back to and/or reference the use of the list of mediators provided for at s72.</p>	
<p><b>Subdivision C – Hearings</b></p>	<p>The OSBC notes the cost estimates that have been included in the Explanatory Memorandum. That is, that estimated resourcing to hold 1 inquiry project involving public hearings every 4 years.</p> <p>Operationally it is only the Minister that is able to request that a hearing be held. Conversely the Ombudsman is not able to initiate a hearing of their own volition.</p> <p>The concept that the Ombudsman is able to hold hearings has an adversarial connotation, particularly for those hearings which are held publicly. This goes against any good will that may be held by the parties to a dispute which may seek assistance from the Ombudsman.</p>	<p>Provisions be included to enable the Ombudsman to initiate a hearing of their own volition.</p>