

Chapter 1

Introduction and background

1.1 On 3 June 2015 the Hon Bruce Billson MP, Minister for Small Business, introduced the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (the ASBFEO bill, or the bill) and the Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015 (the consequential and transitional provisions bill) into the House of Representatives.¹ The two bills (the bills) were passed by the House of Representatives on 17 June 2015,² and introduced into the Senate the same day.³

1.2 On 18 June 2015, in consideration of a report of the Selection of Bills Committee, the Senate referred the bills to the committee for inquiry and report by 11 August 2015.⁴ The reason for referral in the report of the Selection of Bills Committee was that '[t]he role and operation of the small business Ombudsman seem inconsistent with the operation of similar Ombudsman positions'.⁵

Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations inviting submissions to the inquiry, by 17 July 2015. The inquiry was also made public on the committee's website (www.aph.gov.au/senate_legalcon).

1.4 The committee received 14 submissions to the inquiry. The list of submissions and additional information received by the committee is listed at Appendix 1.

Background to the bills

1.5 Small businesses represent approximately 97 per cent of all Australian businesses, and employ around 4.6 million Australians. Family enterprises represent approximately 70 per cent of Australian businesses.⁶ A 2012 study found that small businesses in Australia spent around \$28,000 and almost 500 hours per year meeting compliance burdens, and The Treasury estimated in 2014 that regulatory compliance costs could comprise as much as five per cent of Gross Domestic Product (GDP).⁷

1.6 The position of Australian Small Business Commissioner (ASBC) was established in 2013 to provide information and assistance to small businesses,

1 House of Representatives, *Votes and Proceedings*, No.121, 3 June 2015, pp 1354-1355.

2 House of Representatives, *Votes and Proceedings*, No.125, 17 June 2015, p. 1395.

3 *Journals of the Senate*, No.97, 17 June 2015, pp 2695-2696.

4 *Journals of the Senate*, No.98, 18 June 2015, pp 2705-2706.

5 Senate Standing Committee for Selection of Bills, *Report No.7 of 2015*, 18 June 2015, Appendix 1.

6 Explanatory Memorandum, p. 7. The EM sources these figures to the Australian Bureau of Statistics, which defines small businesses as those with less than 20 employees.

7 Explanatory Memorandum, p. 8.

including referral to dispute resolution services; to represent small business interests and concerns to the Australian Government; and to work with industry and government to promote a consistent and coordinated approach to small business matters.⁸ The ASBC is not established under legislation, and the position has been held by Mr Mark Brennan on a contract basis since its inception in January 2013.

1.7 Four states—NSW, Victoria, South Australia and Western Australia—have established small business commissioners as independent statutory officers. The ASBC presently works collaboratively with the state-based commissioners on issues of national or interstate relevance.⁹

1.8 In its policy for small business prior to the 2013 election, the coalition pledged to transform the Australian Small Business Commissioner into a small business ombudsman with 'real power', to be a Commonwealth-wide advocate for small enterprises, a single entry point for national business programs and support, a contributor to making Commonwealth laws and regulations more small business friendly, and a 'concierge' for dispute resolution.¹⁰

1.9 In January 2014 the government released a discussion paper on the proposed Australian Small Business and Family Enterprise Ombudsman (ASBFE Ombudsman) to selected Commonwealth, state and territory officials. Following consideration of their feedback, a public discussion paper was released in April 2014. The consultation process on the discussion paper received 53 submissions, and included 30 face-to-face meetings with stakeholders.¹¹

1.10 On 18 August 2014 the government announced a proposed draft model for the ASBFE Ombudsman, and an exposure draft of the bills was released for public comment on 11 March 2015. Several weeks of consultations were held including discussions with 43 stakeholders, and 44 submissions were received.¹²

1.11 The 2014 Budget allocated \$8.0 million over four years for the ASBFE Ombudsman position. According to The Treasury, the establishment of the Ombudsman would result in net regulatory savings of \$0.007 million per year, while offering broader net economic benefits to businesses estimated at \$18.209 million per year, and overall net economic savings of \$18.395 million per year.¹³

Purpose of the bills

1.12 The purpose of the bills is to establish the position of Australian Small Business and Family Enterprise Ombudsman under Commonwealth law. The ASBFE

8 Australian Small Business Commissioner, 'Our Role', at <http://www.asbc.gov.au/about/our-role>.

9 Explanatory Memorandum, p. 56.

10 The Treasury, *Submission* 10, p. 1.

11 Explanatory Memorandum, pp 10, 99-101.

12 Explanatory Memorandum, p. 11; 101-104.

13 Explanatory Memorandum, pp 4-5.

Ombudsman would replace the Australian Small Business Commissioner, and would have an advocacy function and an assistance function.

1.13 The Treasury advised that:

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.¹⁴

Key provisions of the bills

The ASBFEO bill

1.14 Clause 12 of the bill establishes the Australian Small Business and Family Enterprise Ombudsman. Under clause 24 the ASBFE Ombudsman would be appointed by the Governor-General on a full-time basis for a period of up to five years, provided that the minister was satisfied that the person had suitable qualifications or experience, and was of good character (subclause 24(2)).

1.15 Clause 13 provides that the functions of the ASBFE Ombudsman would be:

- (a) to advocate for small businesses and family enterprises in relation to relevant legislation, policies and practices (the 'advocacy function');
- (b) to give assistance in relation to relevant actions if requested to do so (the 'assistance function'); and
- (c) to perform any other function conferred by Act or legislative instrument.

1.16 Under clause 16, certain 'general policy guidelines' are provided for the ASBFE Ombudsman's performance of its functions, including (subclause 16(b)) that the ASBFE Ombudsman must 'avoid duplicating the operations of any other agency...that performs a function that wholly or partly overlaps with a function of the Ombudsman'.

1.17 Clause 18 gives the ASBFE Ombudsman the power to 'do all things necessary or convenient to be done for or in connection with the performance' of the functions of the role. In fulfilling the role, the ASBFE Ombudsman may inform him or herself in any way he or she thinks fit, consult with anyone, and receive written or oral information or submissions (subclause 17(2)).

1.18 The Explanatory Memorandum describes the ASBFE Ombudsman as a 'departmental official', and advises that in line with the government's smaller government agenda, the Ombudsman would receive corporate support and staffing from the department.¹⁵ The bill accordingly provides for the ASBFE Ombudsman to

14 The Treasury, *Submission* 10, p. 2.

15 Explanatory Memorandum, p. 28.

be supported by staff of the department (clause 33) and to delegate powers to certain staff (clause 19).

1.19 Under clause 20 the minister may give written directions by legislative instrument to the ASBFE Ombudsman about the performance of his or her functions, and the Ombudsman must comply with such directions (subclause 20(3), although these directions must be 'of a general nature only' (20(2)). The minister may also compel the ASBFE Ombudsman to provide 'specified reports' relating to its functions (clause 21). Annual reporting on the ASBFE Ombudsman's work must be included in the department's annual report (clause 23).

1.20 The ASBFE Ombudsman may resign in writing to the minister (clause 28), or may be terminated by the minister for 'misbehaviour' or if physical or mental capacity renders him or her incapable of performing the duties of the office (clause 30). The minister may also terminate the Ombudsman's appointment on other grounds including bankruptcy, excessive absence without leave, engagement in other paid work, or failure to comply with accountability legislation.

The advocacy function

1.21 Clause 14 provides that the ASBFE Ombudsman's advocacy function would include identifying the concerns of small businesses and family enterprises arising from legislation, policy or practice; conducting research and inquiries either on the ASBFE Ombudsman's own initiative or on matters referred by the minister; providing advice to the minister on matters referred under the bill; working cooperatively with other agencies to develop national strategies, contribute to inquiries and review proposals in relation to legislation, policies and practices; and promoting best practice in interactions with small businesses and family enterprises.

1.22 These advocacy functions are expounded in more detail in Part Three of the bill. Clause 36 empowers the ASBFE Ombudsman to conduct research and inquiries on his or her own initiative on the impact of legislation, policies or practices on small businesses or family enterprises, or on improvements to such that may assist them. In conducting such inquiries the Ombudsman may compel people to provide information and documents (clause 37).

1.23 The ASBFE Ombudsman must report quarterly to the minister on the research and inquiries undertaken (clause 40), and the minister may publish such reports (clause 41), but the minister may also redact information and recommendations from publication if it 'would be likely to adversely affect the interests of any person' and the minister 'reasonably believes that it is in the public interest to delete the information or recommendation'.¹⁶

1.24 The minister may also refer matters to the ASBFE Ombudsman for inquiry (clause 42) and in doing so, the minister may require the Ombudsman to do certain things, including conduct public hearings (subclause 42(2)(a)). Clauses 45-54 set out

16 Clause 92 provides that decisions by the minister to delete information from publication of a report or advice, under this and other relevant clauses in the bill, may be reviewed by application to the Administrative Appeals Tribunal.

the procedures for such hearings, which include powers to summon persons to give evidence (clause 48) and penalties upon persons who refuse to answer questions or produce documents (clause 49). Under clause 55, the ASBFE Ombudsman must report on the inquiry to the minister, who must table the report in each House of Parliament in accordance with clause 56. The minister may, however, withdraw or amend the reference at any time, whether or not the ASBFE Ombudsman has made a report (subclause 42(4)).

1.25 The minister may also refer a matter to the ASBFE Ombudsman for advice (clause 57) and the minister may publish such advice 'in any way he or she thinks fit' (subclause 58(1)).

1.26 Other clauses in Part Three set out various other methods by which the ASBFE Ombudsman would be able to perform advocacy functions, including working cooperatively with other agencies to develop national strategies; reviewing proposed legislation or policy; and promoting best practices.

The assistance function

1.27 Clause 15 provides for the ASBFE Ombudsman to respond to requests for assistance, including by referring requests to another Commonwealth, state or territory agency, or by working cooperatively with another agency to provide assistance. Where a request for assistance involves a dispute, the ASBFE Ombudsman would be empowered to make recommendations about how to manage the dispute, including recommending the use of an alternative dispute resolution process.

1.28 Part Four of the bill sets out the assistance function in detail. Under clause 66, any person may request assistance from the ASBFE Ombudsman orally or in writing, although clause 67 clarifies that the Ombudsman may only assist where the request relates to a 'relevant action' and is not excluded by virtue of being a state or territory, court or parliamentary matter. Clause 68 provides further grounds on which the ASBFE Ombudsman may decline to assist, such as frivolous or vexatious requests.

1.29 Under clause 69, the ASBFE Ombudsman must not give assistance where the Ombudsman reasonably believes that the request could have been made to another Commonwealth, state or territory agency, and could be more conveniently or effectively dealt with by that other agency, which has the legal power to do so. The Ombudsman must make such decisions in consultation with other agencies as relevant, and refer such requests to them accordingly (69(4)). Clause 70 provides for the ASBFE Ombudsman to enter an arrangement with another agency to deal cooperatively with requests for assistance.

1.30 The Explanatory Memorandum states that examples of such other agencies 'include, but are not limited to, the Commonwealth Ombudsman and the state small business commissioners'.¹⁷

1.31 Where a matter is within the remit of the ASBFE Ombudsman and is not to be referred to another agency, the ASBFE Ombudsman may make recommendations on

17 Explanatory Memorandum, p. 38.

how the dispute is to be managed. Clauses 75-77 make provision for the ASBFE Ombudsman to gather information, including requiring the provision of information and documents, to assist in determining how to deal with requests for assistance.

1.32 Under clause 71, the ASBFE Ombudsman may recommend that the parties to the dispute take part in an alternative dispute resolution (ADR) process, and may publish and draw upon a list of ADR providers recommended for this purpose (clause 72). Clause 73 specifies that the parties to the dispute choose the ADR provider, and that an ADR process under the bill must not be conducted by the ASBFE Ombudsman, or a delegate, member of staff or consultant of the Ombudsman.

1.33 Under clause 74, the ASBFE Ombudsman may publicise a party's refusal to participate in, or withdrawal from, a recommended ADR process. Such a decision is reviewable by the Administrative Appeals Tribunal under subclause 92(c).

Review of assistance function

1.34 Clause 95 requires that the minister arrange a review of the ASBFE Ombudsman's assistance function by no later than 30 June 2017, and at least once every four years thereafter. The reports from the reviews must be tabled in parliament. The reviews must include consideration of whether the assistance given by the ASBFE Ombudsman during the period was 'convenient and effective', and whether amendments to the legislation are needed to improve the convenience and effectiveness of assistance to small businesses and family enterprises. These requirements are not exhaustive, and the Explanatory Memorandum states that the reviews 'may additionally consider other matters'.¹⁸

Definitions

1.35 Clause 5 defines a 'small business' as one, however named, which has fewer than 100 full-time equivalent employees, or made revenue of less than \$5 million in the previous financial year.¹⁹ Under clause 6 a 'family enterprise' is a small business operated as a family enterprise.

1.36 Various provisions of the bill relate to cooperation between the ASBFE Ombudsman and other agencies, including the referral of requests for assistance to them. Clause 8 defines an 'agency' of the Commonwealth, or a state or territory, as:

- a department of state of the Commonwealth, or the state or territory;
- an 'agency, authority or body (whether incorporated or not) established for a public purpose by or under a law' of the Commonwealth, state or territory;
- a person holding office or exercising power under a relevant law; and
- a body, whether incorporated or not, prescribed by the minister. Clause 96 provides for the minister to make such prescriptions by legislative instrument.

18 Explanatory Memorandum, p. 46.

19 If the business was not operating at any time in the previous financial year, subclause 5(1)(ii) provides that it is a small business if its revenue during the current financial year is \$5 million or less.

Constitutional basis

1.37 The Australian Constitution does not provide the Commonwealth with any specific power over small businesses or family enterprises. The bill therefore contains various provisions linking the functions of the ASBFE Ombudsman to various constitutional heads of Commonwealth power including the corporations, trade and commerce, insurance, banking, telecommunications, copyright and territories powers. The principal provisions defining such constitutional scope are clause 35 in relation to the advocacy function and clause 65 in relation to the assistance function. The Explanatory Memorandum additionally cites the Commonwealth's 'nationhood power' as providing a basis for the constitutionality of the bills.²⁰

1.38 A result of this 'patchwork' of constitutional powers is that there are certain limits on the circumstances in which the ASBFE Ombudsman would be empowered to fulfil its role. The Explanatory Memorandum observes, for example, that while the bill defines small businesses to include non-incorporated businesses, a dispute between two unincorporated small businesses within the same state could not be dealt with by the ASBFE Ombudsman.²¹

1.39 The bill specifies that to the extent state and territory laws are capable of operating concurrently with the bill, the bill is not intended to exclude or limit those laws (clause 79).

The consequential and transitional provisions bill

1.40 Schedule 1 of the consequential and transitional provisions bill would amend the *Ombudsman Act 1976* to provide for the Commonwealth Ombudsman to transfer complaints to the ASBFE Ombudsman, in consultation, where the ASBFE Ombudsman has the power to deal with the complaint, and the Commonwealth Ombudsman is of the opinion that it could be more conveniently or effectively dealt with by the ASBFE Ombudsman.

1.41 Schedule 2 contains provisions for the transition of information and documents between the Australian Small Business Commissioner and the ASBFE Ombudsman, including in relation to unfinished requests for assistance from the ASBC.

1.42 The minister advised the committee that:

The creation of the [ASBFE] 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

20 Explanatory Memorandum, p. 13.

21 Explanatory Memorandum, p. 15.

transferred in an orderly manner to the new Ombudsman (as per schedule 2 of the Consequential and Transitional Provisions Bill).²²

Consideration by Scrutiny of Bills Committee

1.43 On 17 June 2015 the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) tabled its comments on the ASBFE Ombudsman bill.²³ The Scrutiny of Bills Committee sought clarification from the minister on four issues in relation to the bill. The minister replied to the Scrutiny of Bills Committee responding to each of these concerns.²⁴ The matters raised, and the minister's responses, are summarised as follows:

- *the extent to which the minister's powers to prevent publication of information in a report or advice from the Ombudsman could be appealed to the AAT*
 - the minister responded that appeals could be made to the AAT in relation to the 'public interest' element of the minister's discretion. The other element of the test, regarding whether disclosure would adversely affect the interests of any person, was an objective matter and would therefore be open to judicial review;
- *the justification for reversing the onus of proof in relation to certain defences under the bill*
 - the minister replied that placing evidential burdens on defendants in these matters was not uncommon, and was reasonable, because they related to matters readily within the knowledge of, or easily evidenced by, the defendant;
- *protection of privacy and the justification for the authority given to use or disclose protected information in certain circumstances*
 - the minister responded that the bills balanced the objective of making information publicly available with the protection of privacy, and that safeguards remained in place to protect individual privacy rights;
- *the absence of standard clauses restricting the delegation of legislative power*
 - the minister advised that the language in the bill was consistent with existing standard form provisions, and no amendment was necessary.

22 The Hon Bruce Billson MP, Minister for Small Business, letter to committee chair of 3 July 2015, p. 2.

23 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.6 of 2015*, 17 June 2015, pp 12-15. Tabled per *Journals of the Senate* No. 97, 17 June 2015, p. 2692.

24 The Hon Bruce Billson MP, Minister for Small Business, letter to the chair of the Senate Scrutiny of Bills Committee, published 12 August 2015.