

# Chapter 2

## Key issues and committee view

2.1 The submissions received by the inquiry overwhelmingly supported the establishment of the ASBFE Ombudsman position, and its proposed role of supporting small business through advocacy and assistance.

2.2 Submitters did, nonetheless, raise some issues of concern and proposals for strengthening the ASBFE Ombudsman bill. This chapter discusses the main issues drawn to the committee's attention, and concludes with the committee's views on these issues and on the bills.

### The title of ombudsman

2.3 Six submissions received by the committee expressed concern about the use of the title 'ombudsman' for this position.<sup>1</sup>

2.4 The Commonwealth Ombudsman argued that the ASBFE Ombudsman 'would not meet the set of criteria widely considered necessary in order to be described as an Ombudsman', and such a title was therefore misleading.<sup>2</sup> The Australian and New Zealand Ombudsman Association (ANZOA) provided the committee with a policy statement endorsed by its members entitled 'Essential criteria for describing a body as an ombudsman', in support of its argument that the ASBFE Ombudsman did not fit within the accepted definition of an ombudsman.<sup>3</sup>

2.5 Both the Commonwealth Ombudsman and ANZOA cited in particular the explicit advocacy role to be played by the ASBFE Ombudsman, and that dispute resolution was not the core function of the position, as key reasons why '[t]he office as proposed is not an Ombudsman and should not, in our view, be called one'.<sup>4</sup> The Commonwealth Ombudsman said that:

It is generally understood that the fundamental role of an Ombudsman is to receive and independently investigate complaints made by citizens or consumers, and a body that is largely concerned with advocacy for a particular group therefore cannot fall within the accepted definition of an Ombudsman. An independent and impartial Ombudsman cannot be an advocate for a complainant, Government, or a particular group or class of people.

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1 Commonwealth Ombudsman, *Submission 2*; Australian and New Zealand Ombudsman Association, *Submission 3*; Energy & Water Ombudsman NSW, *Submission 5*; Small Business Development Corporation, *Submission 6*; Telecommunications Industry Ombudsman, *Submission 7*; Restaurant & Catering Australia, *Submission 14*.

2 Commonwealth Ombudsman, *Submission 2*, p. 4.

3 Australian and New Zealand Ombudsman Association, *Submission 3*, pp 5-6.

4 Australian and New Zealand Ombudsman Association, *Submission 3*, p. 2.

While it is noted that the Explanatory Memorandum explains that the advocacy role of the ASBFE Ombudsman will be functionally separate from the ASBFE Ombudsman's other activities, this is insufficient to cure the partiality that is inherent in adopting an advocacy role.<sup>5</sup>

2.6 A related concern for these submitters was perceived limitations on the independence of the position: drawing attention to the minister's powers to direct the ASBFE Ombudsman in relation to various aspects of the performance of its functions, and the Ombudsman's reliance upon the department for staffing and resources, the Commonwealth Ombudsman and ANZOA argued that the ASBFE Ombudsman lacked the independence necessary for a true ombudsman.<sup>6</sup>

2.7 ANZOA saw two key risks in using the title of ombudsman for the ASBFE Ombudsman: that it may erode community trust in (other) ombudsmen and their complaint handling function, and that it may confuse people or organisations who dealt with the ASBFE Ombudsman about its role, because it did not conform to the usual practices of an ombudsman.<sup>7</sup> The Commonwealth Ombudsman believed that the proposed name had the potential to damage the ombudsman 'brand' in Australia, saying that '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'.<sup>8</sup>

2.8 The Small Business Commissioner of Western Australia agreed, saying:

I am concerned that the use of the term 'Ombudsman' may be problematic for small business operators, particularly those with a preconceived notion of what a 'traditional' Ombudsman does.

This confusion may result in small business owners missing out on obtaining the assistance available from the Ombudsman, resulting in an underutilization of the Ombudsman's services by its intended target market.<sup>9</sup>

2.9 Restaurant & Catering Australia advised that the title of 'ombudsman' did not have positive connotations in the hospitality industry, and 'hospitality organisations are more likely to avoid this organisation altogether with "Ombudsman" in the title'.<sup>10</sup>

2.10 Submitters proposed that the nomenclature of 'Small Business Commissioner' should be retained, with additional reference to family enterprises if required, or otherwise suggested alternative names for the ASBFE Ombudsman, such as

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5 Commonwealth Ombudsman, *Submission 2*, p. 5.

6 Commonwealth Ombudsman, *Submission 2*, p. 5; Australian and New Zealand Ombudsman Association, *Submission 3*, p. 4.

7 Australian and New Zealand Ombudsman Association, *Submission 3*, p. 4.

8 Commonwealth Ombudsman, *Submission 2*, p. 6.

9 Small Business Development Corporation, *Submission 6*, p. 2.

10 Restaurant & Catering Australia, *Submission 14*, p. 2.

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Australian Small Business and Family Enterprise Advocate, or Agent-General of Small Business and Family Enterprise.<sup>11</sup>

2.11 The government emphasised that the statutory appointment of the ASBFE Ombudsman by the Governor-General was a clear indication of the independence of the position, in contrast to the ASBC who was employed directly by the government under contract.<sup>12</sup>

2.12 The Explanatory Memorandum stated that:

The Government considers that the 'Ombudsman' title reflects the expanded functions and powers of the position and emphasises the independence of the role. Recognising the need for an Ombudsman to be impartial, the Office of the Ombudsman will be structured to that there is a clear separation between its dispute resolution and advocacy functions.<sup>13</sup>

2.13 In a letter to the committee, Minister Billson observed that:

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.<sup>14</sup>

2.14 The minister acknowledged that 'an Ombudsman who advocates a position regarding a particular issue would not be perceived as impartial in dealing with disputes relating to that issue'. The minister explained that it was for this reason that neither the ASBFE Ombudsman nor the ombudsman's staff would conduct any dispute resolution process, but would instead refer disputes to an outsourced alternative dispute resolution service.<sup>15</sup>

### **Cooperation not duplication: interaction with other bodies**

2.15 Submitters to the inquiry were concerned to ensure that the establishment of the ASBFE Ombudsman would enhance rather than duplicate the support to small business currently provided by other agencies, particularly the state small business commissioners.

2.16 The South Australian Small Business Commissioner (SASBC), while broadly supportive of the establishment of the ASBFE Ombudsman, expressed concern that

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11 Commonwealth Ombudsman, *Submission 2*, p. 6; Australian and New Zealand Ombudsman Association, *Submission 3*, p. 2; Energy & Water Ombudsman NSW, *Submission 5*; Small Business Development Corporation, *Submission 6*, p. 2; Restaurant & Catering Australia, *Submission 14*, p. 2.

12 The Treasury, *Submission 10*, p. 3. See also the Hon Bruce Billson MP, Minister for Small Business, *House of Representatives Hansard*, 17 June 2015, p. 6544.

13 Explanatory Memorandum, p. 74.

14 The Hon Bruce Billson MP, Minister for Small Business, letter to committee chair of 3 July 2015, pp 3-4.

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

'there remains the potential for overlap and confusion between the functions of the Ombudsman and the State-based Small Business Commissioners'.<sup>16</sup> The SASBC believed that the actions listed in the bill in relation to which a person may request assistance from the ASBFE Ombudsman overlapped significantly with matters within the SASBC's purview, creating the potential for confusion among small businesses about which body to approach, and also for 'forum shopping'.<sup>17</sup>

2.17 The Small Business Development Corporation of Western Australia (SBDC) believed there was 'a need for further clarification in relation to areas of clear State responsibility, especially regarding retail lease enquiries and disputes'.<sup>18</sup>

2.18 The NSW Small Business Commissioner expressed the view that the bill was unclear about how referrals between the ASBFE Ombudsman and the state commissioners would work in practice, and would be confusing for small businesses or their representatives, who may have difficulty ascertaining whether to approach the ASBFE Ombudsman or a state commissioner.<sup>19</sup>

2.19 SASBC was also concerned about the discretion conferred on the ASBFE Ombudsman to refer matters to other agencies where the Ombudsman 'reasonably believed' that the matter could be 'more conveniently or effectively' dealt with by another agency, and suggested that the discretion and the 'more conveniently or effectively' test should be removed, such that the ASBFE Ombudsman would be required to refer matters whenever another agency had legal power to deal with them.<sup>20</sup> The NSW Small Business Commissioner agreed that the 'more conveniently or effectively' test was 'a vague phrase which creates unnecessary ambiguity' and should be removed.<sup>21</sup>

2.20 SBDC emphasised 'the importance of collaborative working relationships and effective information sharing mechanisms' between the ASBFE Ombudsman and state agencies.<sup>22</sup> SBDC, SASBC and the NSW Small Business Commissioner all agreed that Memoranda of Understanding (MoU) should be concluded between the ASBFE Ombudsman and the state commissioners to ensure clarity of roles.<sup>23</sup> Restaurant & Catering Australia also recommended that the ASBFE Ombudsman negotiate MoU

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16 Small Business Commissioner South Australia, *Submission 1*, p. 1.

17 Small Business Commissioner South Australia, *Submission 1*, p. 2.

18 Small Business Development Corporation, *Submission 6*, p. 2.

19 Office of the NSW Small Business Commissioner, *Submission 12*, p. 1.

20 Small Business Commissioner South Australia, *Submission 1*, p. 2.

21 Office of the NSW Small Business Commissioner, *Submission 12*, p. 6.

22 Small Business Development Corporation, *Submission 6*, p. 2.

23 Small Business Commissioner South Australia, *Submission 1*, p. 2; Small Business Development Corporation, *Submission 6*, p. 4; Office of the NSW Small Business Commissioner, *Submission 12*, p. 2.

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with industry associations to provide for cooperation on relevant matters, including referrals where appropriate.<sup>24</sup>

2.21 The Commonwealth Ombudsman noted the importance of dealing with potential overlap and avoiding duplication between the ASBFE Ombudsman and its own role, saying that it looked forward to close cooperation with the ASBFE Ombudsman in that regard.<sup>25</sup>

2.22 The Treasury submitted that:

By working co-operatively with the Commonwealth Ombudsman, the state small business commissioners, other state and territory officials and peak industry bodies, the new Ombudsman will ensure that small businesses and family enterprises have their matters dealt with, conveniently and effectively, by the most appropriate agency. The new Ombudsman will therefore, as per the 2013 election commitment, refer people to, for example, state-based options, or, if the circumstances permit, the Ombudsman's own outsourced dispute resolution service to help resolve disputes involving Commonwealth agencies...

The Ombudsman, by working co-operatively with existing Commonwealth, state and territory agencies, will avoid duplicating the services of other agencies, and instead complement the services they provide.<sup>26</sup>

2.23 In relation to potential confusion about the respective roles of the ASBFE Ombudsman and other agencies, the government advised that such a risk would be mitigated through a targeted communication and engagement strategy, particularly in the first year of the Ombudsman's operation, to educate small businesses and the broader community about the role and powers of the new office.<sup>27</sup>

2.24 The Treasury also noted that the ASBFE Ombudsman would not have the authority to re-open decisions taken by other agencies, and confirmed the government's intention to conclude arrangements such as MoU with existing agencies to facilitate cooperation and referrals.<sup>28</sup>

## **Dispute resolution**

2.25 Independent Contractors Australia (ICA) emphasised the importance of the ASBFE Ombudsman's proposed mediation function, given the power imbalance in disputes between small businesses and large businesses or government agencies. For

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24 Restaurant & Catering Australia, *Submission 14*, p. 2. Business Enterprise Centres Australia, a network of not-for-profit bodies that provide advice and assistance to small businesses at the local level, also recommended that the ASBFE Ombudsman work with intermediaries and industry bodies: Business Enterprise Centres Australia, submission to the *Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p. 7.

25 Commonwealth Ombudsman, *Submission 2*, p. 7.

26 The Treasury, *Submission 10*, pp 2-3.

27 Explanatory Memorandum, p. 86.

28 The Treasury, *Submission 10*, pp 4, 86.

this reason, ICA sought strengthening of the mediation provisions for the ASBFE Ombudsman, including empowering the ASBFE Ombudsman to compel parties' participation in mediation; making alternative dispute resolution (ADR) compulsory for Commonwealth agencies; making attempted resolution through ADR a prerequisite to any court action by the parties; and providing for the Ombudsman to report to a court on the outcome of ADR undertaken.<sup>29</sup>

2.26 Restaurant & Catering Australia (R&CA) expressed disappointment with what it described as the 'minimal and limited' dispute resolution services to be provided by the ASBFE Ombudsman, expressing the view that the position's 'diminished dispute resolution capacity reduces the avenues with which small business can access advice should state-based commissioners be unable to provide tailored and technical support on business-to-business disputes'.<sup>30</sup>

2.27 While open to the outsourcing model, ICA was concerned that using private ADR providers may make mediation very expensive, in comparison with the subsidised low-cost services provided directly by state small business commissioners. ICA said it 'would want to see some guarantees around ensuring low-cost mediation where mediation is recommended'.<sup>31</sup> The NSW Small Business Commissioner expressed a similar concern, and also noted the need for the ASBFE Ombudsman to monitor the quality and cost-effectiveness of the ADR services provided.<sup>32</sup>

2.28 The Treasury expressed the view that the outsourcing of dispute resolution services 'will give everyone confidence in the integrity of the process'. The Treasury also noted that seeking the Ombudsman's assistance would not curtail stakeholders' rights to take matters to court.<sup>33</sup> Estimates in the Explanatory Memorandum indicated that mediation of disputes referred by the ASBFE Ombudsman would cost around \$8500 to each party in out-of-pocket and staff expenses,<sup>34</sup> compared to average costs of approximately \$118,000 per applicant for the resolution of matters through the Federal Court.<sup>35</sup>

### ***Definition of 'agency'***

2.29 The Financial Ombudsman Service (FOS), an independent dispute resolution scheme operating within the financial sector on a contractual (rather than legislative) basis, raised concern that the definition of 'agency' in the bill may not adequately provide for the ASBFE Ombudsman to transfer disputes to FOS.<sup>36</sup> FOS acknowledged

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29 Independent Contractors Australia, *Submission 4*, pp 4-6.

30 Restaurant & Catering Australia, *Submission 14*, p. 1.

31 Independent Contractors Australia, *Submission 4*, p. 5.

32 Office of the NSW Small Business Commissioner, *Submission 12*, pp 6-7.

33 The Treasury, *Submission 10*, p. 5.

34 Explanatory Memorandum, p. 86.

35 Explanatory Memorandum, p. 88.

36 Financial Ombudsman Service, *Submission 11*.

that the bill allowed the minister to designate agencies for this purpose via legislative instrument. However, FOS sought further amendments to various provisions of the ASBFE Ombudsman bill to create a separate category of 'agency', and explicitly recognise bodies established under contract rather than legislation.

2.30 The Australian Bankers' Association endorsed the concerns of FOS, and recommended that clause 72 of the bill should require (not just empower) the ASBFE Ombudsman to publish a list of ADR providers to whom disputes may be referred, and that such a list must include any dispute resolution schemes approved under financial services legislation, including FOS.<sup>37</sup>

2.31 The Explanatory Memorandum advised that:

The Bill is intended to cover a wide range of agencies, to ensure that the functions of the Ombudsman are not duplicating the functions [of] other Commonwealth, state or territory officials. The term 'agency' is very broad and includes a department of state or a local government body. It also includes any other agency, authority or body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth, a state or a territory. Additionally, any entity (whether incorporated or not) may be prescribed as an agency for the purposes of the Bill.<sup>38</sup>

### ***"Naming and shaming"***

2.32 Submitters were divided in their views on the ASBFE Ombudsman's proposed power to "name and shame" parties who refused to participate in, or withdrew from, ADR processes referred under the bill. The NSW Small Business Commissioner believed that these powers may compromise parties' willingness to deal with the ASBFE Ombudsman, and should be removed.<sup>39</sup> Other submitters such as ICA supported this power, and argued that the ASBFE Ombudsman should have even greater power to compel participation by parties in ADR.<sup>40</sup>

2.33 Minister Billson advised the committee that the Victorian Small Business Commissioner was granted a similar power in 2014, 'and feedback indicates that the mere existence of such a power is effective in encouraging parties to participate' in ADR processes.<sup>41</sup>

### **Definition of 'small business'**

2.34 Some submitters queried the definition of small business adopted in the bills, as a business with fewer than 100 employees or annual revenue under \$5 million, noting that this was different to definitions adopted in other legislation. The NSW Small Business Commissioner believed that the definition was too prescriptive and

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37 Australian Bankers' Association, *Submission* 13, p. 2.

38 Explanatory Memorandum, p. 22.

39 Office of the NSW Small Business Commissioner, *Submission* 12, p. 6.

40 Independent Contractors Australia, *Submission* 4, p. 5.

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

overly complicated.<sup>42</sup> The Australian Automotive Dealer Association (AADA) was concerned that the definition would exclude many of its members, and proposed that the concept of 'relative size' should be used to allow the ASBFE Ombudsman to assist in cases of a 'significant imbalance of economic or market power' between parties.<sup>43</sup>

2.35 The Australian Bankers' Association, on the other hand, submitted that the definition of small business was too broad, and would capture enterprises significantly larger than those generally considered to be small businesses.<sup>44</sup>

2.36 The Explanatory Memorandum stated that the government had chosen an 'inclusive' definition over other common definitions which it considered would be too restrictive and would unduly limit the scope of the ASBFE Ombudsman's role.<sup>45</sup> It cited a recent report of the Productivity Commission which 'warned against governments imposing a single definition of small business', recommending instead that policy makers and regulators define small business in 'ways that are practical and appropriate for their regulatory area'. The government argued that the definition adopted in the bills would 'provide the Ombudsman with a clear remit, and provide clarity to the public on the extent of the Ombudsman's role'. The Explanatory Memorandum further noted that family enterprise was a particularly difficult entity to define, and that family enterprises could also be large or medium-sized. The definition of small business in the bill would therefore include an appropriate subset of family enterprises.<sup>46</sup>

### **Committee view**

2.37 The committee welcomes the creation of the Australian Small Business and Family Enterprise Ombudsman. As The Treasury advised, the ASBFE Ombudsman 'will build on the role of the [Australian] Small Business Commissioner, but also extend it'.<sup>47</sup> While submitters offered various proposals with a view to improving the legislation, all were supportive of strengthening the government's support for small businesses and family enterprises by creating a role with more powers, to fill gaps in the current system of largely state-based resources, and to enhance advocacy and assistance at the Commonwealth level.

2.38 The committee has considered the concerns raised by submitters, including those relating to the use of the title of 'ombudsman'. The committee notes the government's position that the statutory appointment of the ASBFE Ombudsman, and the clear separation between its advocacy role and its (outsourced) dispute resolution function, provide for appropriate independence and impartiality.

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42 Office of the NSW Small Business Commissioner, *Submission 12*, p. 3.

43 Australian Automotive Dealer Association, *Submission 9*, p. 1.

44 Australian Bankers' Association, *Submission 13*, p. 2.

45 Explanatory Memorandum, p. 68.

46 Explanatory Memorandum, p. 20.

47 The Treasury, *Submission 10*, p. 4.



2.39 The committee is not convinced that the title of 'ombudsman' is inappropriate for this position, but notes concerns that it may confuse or deter potential clients. The committee suggests that this should be monitored during the early operation of the office.

2.40 In relation to the other issues and suggestions raised by submitters, the committee believes that these should not delay implementation of this important new initiative, but are matters that may also be taken under consideration as the ASBFE Ombudsman commences work and the success of the mechanism is tested.

2.41 To that end the committee notes that the legislation requires the ASBFE Ombudsman's assistance role to be regularly reviewed, with the first review to take place within two years of its commencement. The committee is of the view that the minister should not take a narrow approach when commissioning such a review, particularly the first one, but allow wide scope for consideration of all issues relevant to how well the legislation, and the ASBFE Ombudsman position, is working.

2.42 The committee recommends that, should the bills enter into law, the first review of the legislation include examination of the following issues:

- whether the nomenclature of the position has caused any confusion for prospective clients or the broader community, or made small businesses or family enterprises reluctant to use the service;
- whether the provisions relating to cooperation with and referrals to other agencies have been effective in allowing the ASBFE Ombudsman to work appropriately with all relevant bodies, or whether these have created any procedural or legal difficulties for the ASBFE Ombudsman or for other agencies; and
- the extent to which the alternative dispute resolution services referred by the ASBFE Ombudsman have provided a successful and cost-effective means for small businesses and family enterprises to resolve relevant disputes.

2.43 In conclusion, bearing in mind the potential value of the position to small businesses and family enterprises and to the broader economy; the support it has drawn from stakeholders during a lengthy consultation process; and the opportunity to further review and strengthen the legislation in future, if needed; the committee is of the view that establishment of the ASBFE Ombudsman should proceed.

### **Recommendation 1**

**2.44 The committee recommends that the bills be passed.**

**Senator the Hon Ian Macdonald  
Chair**

