

## **Additional comments of the Australian Labor Party**

1.1 The independence and impartiality of the role of an ombudsman is important to all Australians. The office of Commonwealth Ombudsman exists to safeguard the community in its dealings with government agencies, and to ensure that administrative action by Australian Government agencies is fair and accountable.

1.2 The establishment of the office of Commonwealth Ombudsman was first moved under the Whitlam Labor Government and enabled by legislation in 1976, commencing operation on 1 July 1977. The Commonwealth Ombudsman can investigate complaints about the actions and decisions of Australian Government agencies to see if they are wrong, unjust, unlawful, discriminatory or just plain unfair.

1.3 The inaugural office of the Australian Small Business Commissioner (ASBC) was established by the Gillard Labor Government in 2013. The principal functions of the ASBC are to:

- provide information and assistance to small businesses, including referral to dispute resolution services;
- represent small business interests and concerns to the Australian Government; and
- work with industry and government to promote a consistent and coordinated approach to small business matters.

1.4 This Australian Small Business and Family Enterprise Ombudsman Bill 2015 (the bill) seeks to abolish the office of the ASBC and replace the role with the new Australian Small Business and Family Enterprise Ombudsman (ASBFE Ombudsman).

### **Title of Ombudsman**

1.5 This bill, with the establishment of the office of the ASBFE Ombudsman, cannot fulfil the functions of an independent and impartial umpire and will therefore compromise the safeguard role that a traditional ombudsman plays on behalf of all Australians.

1.6 The advocacy and dispute resolution functions of the ASBFE Ombudsman at the heart of this bill are inconsistent with an accepted set of criteria considered necessary to be described as an ombudsman.

1.7 Labor Senators note the strong opposition expressed by numerous expert groups and peak organisations in the six submissions that expressed a view about the use of the term 'ombudsman' in the title.<sup>1</sup> The Commonwealth Ombudsman identified concerns with the suitability of the title 'ombudsman' for this role, and the Australian and New Zealand Ombudsman Association (ANZOA) noted that the office proposed

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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*.

'is not an Ombudsman and should not...be called one'.<sup>2</sup> The Commonwealth Ombudsman expressed strong concern that:

Use of the term Ombudsman in this context is...misleading and has the potential to damage the 'Ombudsman' brand that has been developed by Ombudsman offices throughout Australia over the last 40 years.<sup>3</sup>

1.8 As noted in the main report, both Restaurant & Catering Australia and the Small Business Commissioner of Western Australia expressed concern that the title may actually prevent small businesses and family enterprises from approaching the new office.<sup>4</sup> The Energy & Water Ombudsman NSW 'urge[d] the committee to reconsider the name' and replace it with a more accurate one.<sup>5</sup>

### ***Independence and impartiality***

1.9 Labor Senators are concerned that the new ASBFE Ombudsman is described in the Explanatory Memorandum as a 'departmental official' who will receive corporate and staffing support from the department.<sup>6</sup> One of the generally accepted core functions of an ombudsman is for the ombudsman to be able to independently and impartially investigate the actions of government agencies. This may prove difficult with the administrative arrangements and organisation of the ASBFE Ombudsman described in the bill as being structured within a departmental agency of government.

1.10 Under clause 20 of the bill the minister may give written directions to the Ombudsman and the Ombudsman must comply with these directions. The activities of the Commonwealth Ombudsman's office are governed by a number of Commonwealth laws, principally the *Ombudsman Act 1976*. The Commonwealth Ombudsman's office delivers an annual report which provides details of the numbers and types of complaints dealt with, and the ways in which they are resolved. The Commonwealth Ombudsman must provide the minister an annual report under section 46 of the *Public Governance, Performance and Accountability Act 2013*.

1.11 Labor Senators are concerned that this bill requires that the ASBFE Ombudsman provide quarterly reports to the minister on the research and inquiries undertaken. Our principal concern goes to the lack of an effective arms-length separation of powers between the ASBFE Ombudsman and the minister's office. The bill describes arrangements that could reasonably be described as a close working relationship with the minister's office and one that is not far removed from ongoing oversight by or influence of the minister.

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

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

4 Small Business Development Corporation, *Submission 6*, p. 2; Restaurant & Catering Australia, *Submission 14*, p. 2.

5 Energy & Water Ombudsman NSW, *Submission 5*.

6 Explanatory Memorandum, p. 28.

1.12 This was rightly reflected in the views of some stakeholders expressed to the inquiry. The Office of the NSW Small Business Commissioner (OSBC), for example, submitted that:

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.<sup>7</sup>

1.13 Business Enterprise Centres Australia expressed the view that it would be preferable for the Ombudsman to report directly to Parliament, rather than to the minister.<sup>8</sup>

1.14 Labor Senators consider the operation of the existing Commonwealth Ombudsman, particularly its relationship to the government of the day, to be a more appropriate association and one that should be considered as a model to be applied to the role of ASBFE Ombudsman.

1.15 Failure to address this fundamental issue will result in a lowering of expectations by the community and the potential for a diminution over time of the respect and high regard Australians have for the role of an ombudsman.

### ***Advocacy role***

1.16 Labor Senators note the views of those expressing concerns regarding the advocacy function to be performed by the ASBFE Ombudsman. Those concerns go to the combined role of advocacy on behalf of a group or individual and the role of independent and impartial investigator as an ombudsman. Labor does not consider the advocacy functions set out for the ASBFE Ombudsman as being the primary role or function of an ombudsman. Rather, it is Labor's view that those functions could be provided by the existing Australian Small Business Commissioner. This would allow for a clear separation of the two roles and maintain the independence and impartiality of the new ASBFE Ombudsman.

1.17 In The Treasury's consultations on the exposure draft legislation for the ASBFE Ombudsman, the Australian and New Zealand Ombudsman Association, the Financial Ombudsman Service of Australia and the Association of Dispute Resolvers (LEADR-IAMA) all noted the advocacy function as being of considerable concern

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7 Office of the NSW Small Business Commissioner, *Submission 12*, p. 2.

8 Business Enterprise Centres Australia, submission to the *Small Business and Family Enterprise Ombudsman Discussion Paper*, April 2014, p. 4.

and inconsistent with the role of an independent ombudsman.<sup>9</sup> The Shopping Centre Council of Australia submitted that the use of the term 'ombudsman' in the title was misleading and should be changed to Commissioner.<sup>10</sup> A similar view was expressed by the Telecommunications Industry Ombudsman.<sup>11</sup>

1.18 The Australia and New Zealand Ombudsman Association (ANZOA) submitted to The Treasury and to this committee that:

It is clear...that the role for the Small Business and Family Enterprise agency is an advocate—both in reality and perception. As such, it does not meet the independence criterion...Again, this is no criticism of the proposal. ANZOA supports the aims of the proposal to assist small business and family enterprise, but strongly submits that it should be called something other than an Ombudsman.<sup>12</sup>

1.19 The minister has even 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'.<sup>13</sup> However, the minister maintains that the ASBFE Ombudsman or the Ombudsman's staff will not conduct any dispute resolution processes but rather refer matters to outsourced alternative dispute resolution providers, and that this separation between dispute resolution and advocacy ensures the independence of the role.

1.20 Labor Senators note the view expressed by the minister, but consider nevertheless that the arrangements prescribed in the bill are inappropriate for an office being established with the title of ombudsman, and fear that this will lead to confusion among small business owners resulting in underutilisation of the service.

### **Outsourced dispute resolution**

1.21 Labor Senators consider that an ombudsman must be truly independent if he or she is to have the confidence of the community. The ASBFE Ombudsman bill includes a dispute resolution function, but the bill designates this role as a secondary function with an emphasis on the Ombudsman primarily being a 'concierge for complaints'. Dispute resolution services are allocated to a panel of dispute resolution

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9 Australian and New Zealand Ombudsman Association, pp 1-2; Financial Ombudsman Service, p. 10; LEADER and IAMA, p. 5; submissions to The Treasury's consultations on the exposure draft legislation for the Australian Small Business and Family Enterprise Ombudsman, at <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Australian-Small-Business-and-Family-Enterprise-Ombudsman/Submissions>

10 Shopping Centre Council of Australia, submission to The Treasury's consultations on the exposure draft legislation for the Australian Small Business and Family Enterprise Ombudsman, 7 April 2015, p. 1.

11 Telecommunications Industry Ombudsman, submission to The Treasury's consultations on the exposure draft legislation for the Australian Small Business and Family Enterprise Ombudsman, 7 April 2015, pp 15-16.

12 Australia and New Zealand Ombudsman Association, *Submission 3*, p. 11.

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

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providers and any role the Ombudsman plays in the resolution of disputes is only minor.

1.22 Regarding those able to provide dispute resolution services, the Mediator Standards Board noted in its submission to consultations on the exposure draft of the legislation the need for those mediators that can perform dispute resolution services to be accredited under the National Mediator Accreditation System.<sup>14</sup>

1.23 Clause 72(1) of the bill provides that:

the Ombudsman may publish a list of persons who:

(a) have the qualifications or experience to conduct alternative dispute resolution processes to resolve disputes in relation to relevant actions...

1.24 Clause 72(2) of the bill provides that:

the Minister may, by legislative instrument, prescribe:

(a) the qualifications or experience required for persons to be included on the list...

1.25 Labor Senators support the concerns of the Mediator Standards Board and urge the government to prescribe that those able to conduct alternative dispute resolution services are required to be accredited under the National Mediator Accreditation System.

### **Concluding comments**

1.26 The Abbott Government has raised the expectations of the small business sector in election commitments and statements since the Minister for Small Business announced that the new ASBFE Ombudsman would be able to more effectively deal with and resolve small business issues.

1.27 Labor Senators are not convinced that the new role of ASBFE Ombudsman has the statutory independence of an ombudsman, and consider that the role prescribed in the bill is not comparable to an ombudsman. The new role of ASBFE Ombudsman is not consistent with the accepted definition of an ombudsman and will lead to confusion and unmet expectations from those seeking an independent and impartial umpire to investigate matters they seek to pursue in a fair and impartial way.

1.28 Labor Senators support the views expressed by stakeholders in the report that the title of 'ombudsman' should be re-considered by the government. The dual roles of advocate and ombudsman are not consistent with the accepted definition of an ombudsman; nor are the regularity of the reporting requirements of the ASBFE Ombudsman and the powers of the minister to direct the Ombudsman.

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14 Mediator Standards Board, submission to The Treasury's consultations on the exposure draft legislation for the Australian Small Business and Family Enterprise Ombudsman, 7 April 2015, at <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Australian-Small-Business-and-Family-Enterprise-Ombudsman/Submissions>.

1.29 Labor Senators are mindful that Australian small business operators may underutilise the new office of ASBFE Ombudsman as a result of these issues as prescribed in the bill.

**Senator Jacinta Collins**  
**Deputy Chair**