

The Senate

Legal and Constitutional Affairs
Legislation Committee

Australian Small Business and Family
Enterprise Ombudsman Bill 2015

Australian Small Business and Family
Enterprise Ombudsman (Consequential and
Transitional Provisions) Bill 2015

August 2015

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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.

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.¹

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.² 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.³

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'.⁴ 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.

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.⁵

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.⁶

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.⁷ 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'.⁸

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.⁹

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'.¹⁰

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

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.

Australian Small Business and Family Enterprise Advocate, or Agent-General of Small Business and Family Enterprise.¹¹

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.¹²

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.¹³

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.¹⁴

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.¹⁵

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

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'.¹⁶ 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'.¹⁷

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'.¹⁸

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.¹⁹

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.²⁰ 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.²¹

2.20 SBDC emphasised 'the importance of collaborative working relationships and effective information sharing mechanisms' between the ASBFE Ombudsman and state agencies.²² 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.²³ Restaurant & Catering Australia also recommended that the ASBFE Ombudsman negotiate MoU

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.

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

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.²⁵

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.²⁶

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.²⁷

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.²⁸

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

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.²⁹

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'.³⁰

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'.³¹ 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.³²

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.³³ 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,³⁴ compared to average costs of approximately \$118,000 per applicant for the resolution of matters through the Federal Court.³⁵

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.³⁶ FOS acknowledged

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.³⁷

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.³⁸

"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.³⁹ 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.⁴⁰

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.⁴¹

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

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.⁴² 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.⁴³

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.⁴⁴

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.⁴⁵ 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.⁴⁶

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'.⁴⁷ 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.

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**

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.¹ 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

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'.² 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.³

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.⁴ The Energy & Water Ombudsman NSW 'urge[d] the committee to reconsider the name' and replace it with a more accurate one.⁵

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.⁶ 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.

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.⁷

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.⁸

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

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.⁹ 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.¹⁰ A similar view was expressed by the Telecommunications Industry Ombudsman.¹¹

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.¹²

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'.¹³ 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

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.

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.¹⁴

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.

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

Appendix 1

Public submissions

- 1 Small Business Commissioner South Australia
- 2 Commonwealth Ombudsman
- 3 Australian and New Zealand Ombudsman Association
- 4 Independent Contractors Australia
- 5 Energy & Water Ombudsman NSW
- 6 Small Business Development Corporation
- 7 Telecommunications Industry Ombudsman
- 8 Motor Trades Association Queensland
- 9 Australian Automotive Dealer Association
- 10 The Treasury
- 11 Financial Ombudsman Service Australia
- 12 Office of the NSW Small Business Commissioner
- 13 Australian Bankers' Association
- 14 Restaurant & Catering Australia

Additional information

- 1 Letter from the Hon Bruce Billson MP, Minister for Small Business to the Chair, 3 July 2015
- 2 Additional information provided by Business Enterprise Centres Australia, 6 July 2015
- 3 Letter from the Hon Bruce Billson MP, Minister for Small Business to the Chair of the Senate Standing Committee for the Scrutiny of Bills, published 12 August 2015

