

Explanatory Materials – Australian Small Business and Family Enterprise Ombudsman Bill 2015

Overview

This document outlines and explains the rationale behind the provisions of the Australian Small Business and Family Enterprise Ombudsman Bill (the Bill) to inform the public consultation process on the Bill. The Bill establishes the Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) and outlines the position's powers and functions. Establishing the Ombudsman was a key 2013 small business election commitment.

The Government has committed to extend the activities of the existing Australian Small Business Commissioner position to create the Ombudsman. The Ombudsman will give small businesses the advice they need and help Government policy-makers better understand the concerns of small businesses¹. Key functions of the Ombudsman are to be a:

- Commonwealth-wide advocate for small businesses. As an independent advocate, the Ombudsman will listen to small businesses and present their views to the Government to better inform the successful implementation of the Government's policy agenda for small business. The Ombudsman will collaborate with state small business commissioners and relevant officials across all jurisdictions to identify systemic issues that warrant a national approach.
- Concierge for dispute resolution, including offering its own dispute resolution service, which will help small businesses resolve disputes early, in turn improving business productivity, preserving business relationships and avoiding expensive litigation.
- Contributor to small business-friendly Commonwealth laws and regulations. The Ombudsman will do this by providing independent advice on draft legislation, regulations and practices, which will improve engagement between the Government and the small business sector, ensure that small business interests are at the centre of policy and programme design and ensure that, wherever possible, red tape burdens are minimised or removed.

The Ombudsman will also seamlessly link with the Government's Single Business Service to help small businesses access general business advice and find out about other Government assistance and programmes. The Bill is not intended to exclude or limit the operation of any state or territory law. As such, the role of the Ombudsman will be complementary to, and avoid overlap with and duplication of, the roles and responsibilities of other ombudsmen, the state small business commissioners and the services provided by state and territory governments where there are no small business commissioners. This will provide an efficient and appropriate service that minimises confusion for small businesses about which office they should approach for assistance.

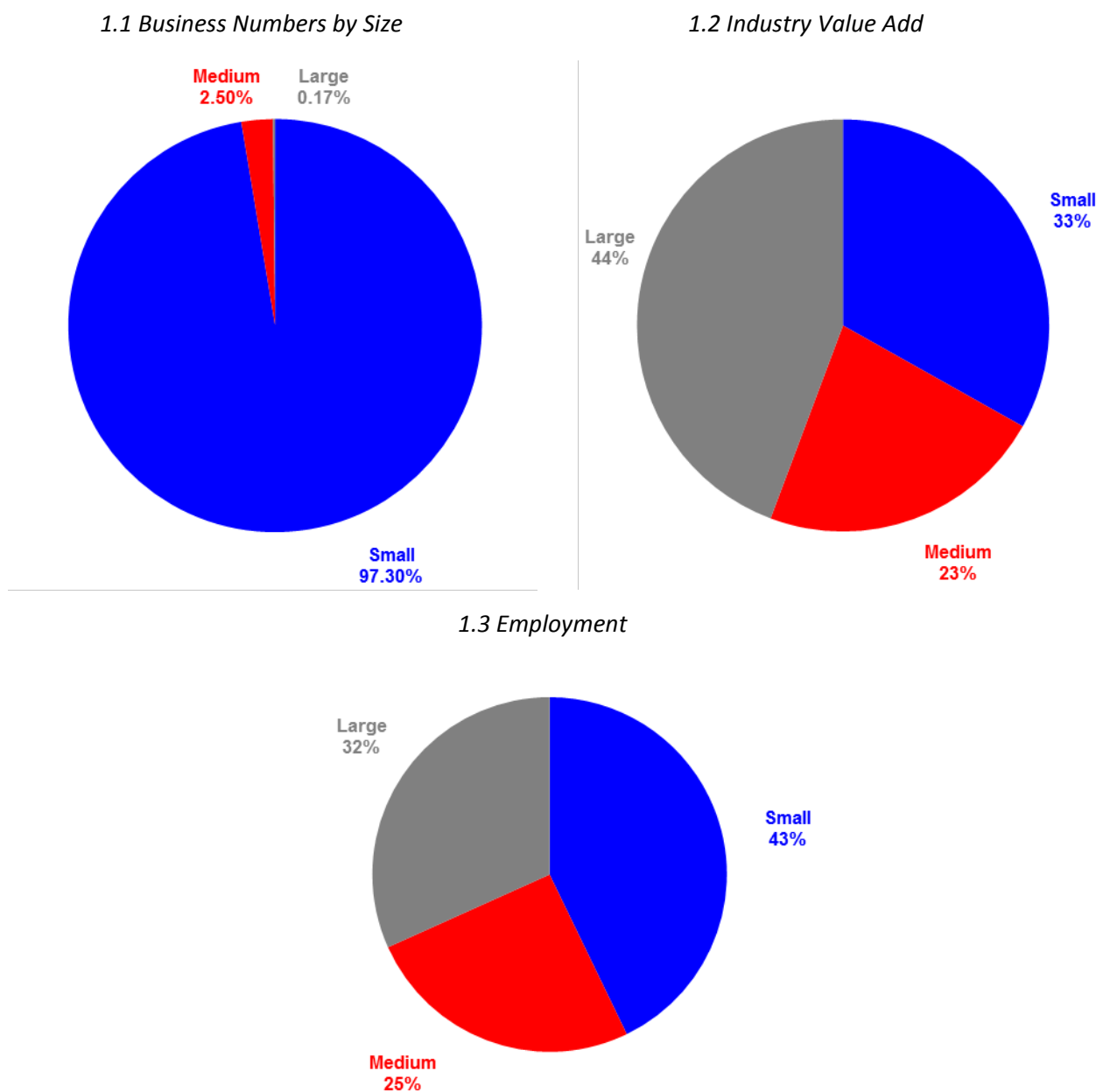
¹ From here on a reference to small business, or small businesses also includes family enterprises. For definitions of both terms, please refer to s5 and s6 of the Bill respectively.

The following information outlines what the Ombudsman is and how it will operate. This is a summary only – for full details please refer to the relevant clauses of the Bill.

Why are we establishing an Australian Small Business and Family Enterprise Ombudsman?

Small businesses make a substantial contribution to employment and production in Australia’s economy. There are more than 2 million actively trading small businesses. As a group, they account for over 97 per cent of all businesses, employ around 4.6 million Australians (or about 43 per cent of private sector non-financial employment) and contribute more than 33 per cent of private sector production as measured by industry value added (Figure 1 refers). Family businesses are estimated to account for 70 per cent of all Australian businesses.

Figure 1: Small business contribution to the economy



Source: 2014 ABS Cat No 8155.0, 8165.0. Note: Both output and employment measures exclude the public and the financial and insurance sector. Business size definitions: Small (0-19 employees), Medium (20-199 employees), Large (Greater than 200 employees).

The unique characteristics of small businesses influence the way they are run and their capacity to deal with issues that arise. Small businesses are not simply larger businesses scaled down. The vast majority of businesses in Australia, 61 per cent, are non-employing businesses. This means that most small business owners are required to be in a position to take decisions on all aspects of their business, from delivering goods and services, managing cash flow, business development, marketing and client management. A further 27 per cent of businesses only employ between one and four people. Family enterprises are characteristically different from other businesses and face particular challenges including managing succession and internal conflict.

Providing support at the national level is a key way that the Government can assist these businesses. Building a strong and confident small business community is central to the Government's commitment to delivering a productive and competitive economy. Fundamental to this is removing roadblocks to small business success. Under its deregulation agenda, the Government is committed to reducing regulatory burdens to restore time, focus and resources back to small business owners to invest in the ongoing operation and success of their businesses. The Government is also committed to working in partnership with the small business sector to achieve the right policy settings. Helping small businesses resolve disputes early will also support small business' productivity, business relationships, cash flow, and viability, and to avoid costly litigation.

What is the Ombudsman?

The Bill establishes an Australian Small Business and Family Enterprise Ombudsman who will be appointed by the Governor-General for a five-year term, and who may be reappointed (refer s24).

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 so that there is a clear separation between its dispute resolution and advocacy functions. This will allow the Ombudsman to speak to the Government about issues facing smaller businesses, but also provide an independent dispute resolution service that helps businesses get the help they need.

The Ombudsman will be supported by an Office of the Ombudsman, including staff employed under the *Public Service Act 1999*, plus consultants as needed. These staff and consultants will work on inquiries and hearings, as well as supporting the Ombudsman in researching and providing advice to the Minister for Small Business (refer s33-34).

The Ombudsman can delegate some of his/her authority to appropriately qualified senior staff. This also allows a senior officer within the Treasury to act as the Ombudsman during a period of absence such as annual leave. This flexibility allows the Ombudsman to best service the needs of the small business community and make the most of the expertise in his/her office (refer s19).

Activities of the Ombudsman, including the nature of its inquiries and the number of kinds of requests for assistance will be included as part of the Department of the Treasury's annual report (refer s23).

How will the Ombudsman operate?

In 2013 the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Family Business in Australia, found that most, but not all, family businesses were small businesses. Therefore family enterprises are defined as a small businesses for the purposes of the Bill (refer s6). The same Parliamentary Inquiry, however, noted that some family enterprises encountered problems, and:

In part, the reason may be that they are seen principally as a subset of small and medium-sized enterprises (SMEs). Few government departments seemed to have awareness of the existence of large family businesses.

Bearing this in mind, it was decided to have as broad a definition as possible of small business in the Bill, since it encompassed family enterprise. Currently the *Farm Household Support Act 1992* defines a small business as a business with fewer than 100 employees. This is the largest employee based definition of a small business currently on the Commonwealth statute book, and so it was decided to use it in the current Bill. The Bill thus defines small businesses as those with fewer than 100 employees, or having revenue of \$5 million in the previous financial year (refer s5). These broad definitions will provide the Ombudsman with the necessary scope to effectively carry out his/her mandate. This is particularly important as a key part of the Ombudsman's mandate will be to investigate and provide recommendations on the impact of regulation and legislation on small businesses at the Commonwealth level.

Advocacy function

The Ombudsman will be an independent advocate who will act as a conduit for, and representative of, issues that small businesses are facing at the national level. In practice, this will mean that the Ombudsman has the power to conduct inquiries into the effect of relevant laws, policies and practices on small businesses, and how these might be improved. For example, the Ombudsman may help monitor and report on the efficacy of industry codes of conduct and fair trading provisions, the behaviour of regulators in undertaking compliance activities, and responsiveness and effectiveness of agency complaints mechanisms.

This power will allow the Ombudsman to make a real difference to the environment that small businesses are operating in. The Ombudsman's work in identifying and reporting on the administrative and compliance burdens on small businesses will also contribute to the Government's deregulation agenda.

The Bill allows the Ombudsman to investigate 'relevant legislation, policies and practices' relating to:

- Commonwealth and Territory agencies;
- constitutional corporations²;
- any entity engaged in international trade or commerce;

² A corporation to which [s51\(xx\) of the Australian Constitution](#) applies, or a body corporate that is incorporated in a territory.

- any entity engaged in trade or commerce among the States, within a Territory, between Territories or between a State and a Territory;
- any entity in relation to insurance, banking, telecommunications, copyright, patents, designs or trademarks; and
- any entity that is operated by those living in or is located in a Territory (refer s35).

Research and inquiries into these issues can be initiated by the Ombudsman him/herself or be referred to him/her by the Minister for Small Business. An inquiry would involve the Ombudsman and staff speaking to stakeholders, requesting documents and information, and possibly holding formal hearings.

The Bill is intended to operate concurrently with state and territory law, so in practice the Ombudsman will avoid overlap with and duplication of the role of existing services, including state-based small business commissioners.

Inquiries under the Ombudsman's initiative

Under an inquiry undertaken on the Ombudsman's initiative, the Ombudsman can require a person to produce information or documents, with at least 10 business days' notice (refer s37).

Non-compliance with a request carries a financial penalty of 30 penalty units (the dollar value of a penalty unit is set out in [s4AA of the Crimes Act 1914](#) and is reviewed every three years – the next review is due in late 2015).

As a Commonwealth-wide advocate to Government of small business issues, the Ombudsman will regularly report to the Minister for Small Business on his/her activities and small business concerns. The Ombudsman is required to write a report for the Minister once a quarter, which outlines the research conducted and inquiries made during the year. In addition, the Ombudsman may, at any time, provide the reports to the Minister outlining the findings and any related recommendations from his/her own-motion research and inquiries (refer s40).

The Minister may release these reports publicly. Before doing so, the Minister needs to take into account whether information in the report would negatively impact the interests of a business or individual. This may be the case, for example, if the inquiry relates to particular business practices across an industry or on a particular project. The Bill provides for the Minister to direct the Ombudsman to notify relevant stakeholders about the intention to publish the report and give them sufficient time (up to 30 days) to put forward any concerns or objections (refer s41(2)). In addition, the Bill requires confidential information to be deleted from the report prior to publication (refer s41(3)). This will ensure that private or commercially sensitive information is not cast into the public domain where it may cause undue embarrassment or disclose trade secrets. Confidential and commercial-in-confidence information is defined in s9 of the Bill.

Inquiries at the Minister's direction

In order to conduct transparent processes and allow interested parties to engage, the Ombudsman is required to give public notification of his/her intent to hold an inquiry. The Ombudsman can also choose to hold formal hearings, which have the same notification requirements. This involves giving

notice in each State and Territory, and taking out an advertisement in a newspaper available in each State and Territory (refer s43-45). Similarly, unless deemed not in the public interest, the Ombudsman is required to hold hearings in public (refer s46).

Under an inquiry undertaken the direction of the Minister, the Ombudsman can require a person to produce information or documents, with at least 10 business days' notice (refer s47).

Non-compliance with a request carries a financial penalty of 30 penalty units (the dollar value of a penalty unit is set out in [s4AA of the Crimes Act 1914](#) and is reviewed every three years – the next review is due in late 2015). Under the Bill, the same penalty applies for failure to attend a hearing (refer s48), refusal to answer questions or produce documents (refer s49), or publication of evidence from a hearing against the Ombudsman's direction (refer s52).

When the Minister has referred a matter to the Ombudsman for inquiry, the Ombudsman must produce a report on the inquiry, which the Minister must table in Parliament. Similar to own-motion inquiry reports, the Ombudsman must notify relevant parties about the intention to publish information in the report and allow parties to identify any concerns or objections. Confidential information must also be removed prior to publication (refer s56).

Contributing to small business-friendly laws and regulations

The Ombudsman will also contribute to small business-friendly laws and regulations by providing advice, drawing on the Ombudsman's broader experiences in the advocacy and assistance functions. This experience gives the Ombudsman a unique perspective on issues adversely affecting small businesses. This function allows the Ombudsman's work to translate into advice to Government. This also relates to recommendations on best practices (refer s64).

The Ombudsman is required to write a report for the Minister once a quarter, which will outline the research conducted and inquiries made and details of any laws, policies or practices that the Ombudsman believes are having (or could have) an adverse effect on small businesses. The reports will be informed by the Ombudsman's experience and will provide the Government with new insights into how regulations are impacting on small businesses, for appropriate action (refer s40).

In performing this role, the Ombudsman will work with the appropriate Commonwealth, State and Territory agencies when developing national strategies for improving relevant laws, policies and practices. This is intended to result in high quality, more well-rounded recommendations (refer s59).

Dispute resolution function

Unresolved disputes and conflicts can significantly impact the performance of a small business. Given the large number of small businesses that have experienced a dispute, but generally lack the resources to resolve it, the Ombudsman will act as a 'conciERGE' for dispute resolution and provide his/her own (limited) dispute resolution service, assisting small businesses on request. This function is designed to allow small businesses to shift their focus back to running their business as quickly as possible.

The Bill outlines the circumstances in which the Ombudsman is authorised to deal with request for assistance. The Ombudsman will make an initial assessment of whether the request relates to a 'relevant action', and therefore if it falls under his/her remit. The Bill defines the scope of a 'relevant

action' to include actions (an activity, project, decision, recommendation, proposal formulation or communications requirement) that affect or may affect a small business, taken by:

- Commonwealth and Territory agencies;
- constitutional corporations³;
- any entity engaged in international trade or commerce;
- any entity engaged in trade or commerce among the States, within a Territory, between Territories or between a State and a Territory;
- any entity in relation to insurance, banking, telecommunications, copyright, patents, designs or trademarks; and
- any entity that is operated by those living in or is located in a Territory (refer s65).

Requests to the Ombudsman could relate to, for example, a complaint about a commercial dealing with a Commonwealth Government agency, or about a process in dealing with interstate trade.

There are certain circumstances where the Ombudsman is not authorised to deal with a request, either because it is not relevant, or because the Ombudsman does not have the power to become involved. For example, the Ombudsman's powers do not extend to assistance where a Minister (Commonwealth, State or Territory) has taken the action in question, or to actions taken by judges, justices or magistrates (refer s67(2) for full circumstances where the Ombudsman cannot deal with a request). Should these circumstances apply, the Ombudsman is required to advise the person making the request in writing explaining why assistance cannot be provided (refer s67(3)).

On receiving a request for assistance, the Ombudsman may take the following actions:

- refer the dispute to the appropriate agency;
- recommend an alternative dispute resolution process; or
- decide not to provide assistance.

Referrals

The Ombudsman must refer requests to an appropriate agency or organisation for further action when that agency is able to deal with the request more conveniently or effectively, or that agency has the legal authority to deal with the request. Examples of these agencies or organisations could include (but are not limited to) the Australian Competition and Consumer Commission (ACCC), the Commonwealth Ombudsman, or State or Territory small business commissioners, as appropriate. In order to ensure a smooth process for the person making the request, the Ombudsman must consult with that agency before transferring the request, and must share all information and documents with them (refer s69).

³ Defined as a corporation to which [s51\(xx\) of the Australian Constitution](#) applies, or a body corporate that is incorporated in a territory.

These requirements are intended to see disputes resolved in the most appropriate manner by the most appropriate body, whilst causing as little administrative inconvenience to the small business in question as possible.

Alternative dispute resolution mechanisms offered through the Ombudsman

At times it is appropriate for a dispute to be settled outside the formal legal system, through an alternative dispute mechanism (ADR). These ADR processes are often more convenient and less costly than formal legal options, and could include services offered by existing providers such as the state-based small business commissioners. Currently there is no Commonwealth-level framework for small businesses to access ADR services; the Ombudsman will fill this gap, making ADR processes more accessible for small businesses.

If the Ombudsman is approached to provide assistance in the case of a dispute, he/she may initially provide the party with recommendations on how the dispute may be managed (refer s71(1)). For example, this could involve:

- talking through the issues and suggesting informal actions they could take to progress to the dispute;
- providing advice on how they could approach the other parties, particularly where the business relationship has broken down; or
- referring the party to existing alternative dispute resolution mechanisms and services (discussed above).

Under the Bill, the Ombudsman must provide a written recommendation if an ADR process is deemed the most appropriate way to manage a dispute (refer s71(2)). The written advice must also explain that, should the parties choose not to undertake, or to withdraw from, the recommended ADR process, the Ombudsman can make this knowledge public (refer s71(4), s74). This provision provides strong incentives for parties to consider carefully their approach to the Ombudsman, but also to take seriously his/her recommendations.

To maintain impartiality, the Ombudsman cannot undertake ADR personally, and ADR mediators must be chosen by parties to the dispute (refer s73). This ensures that the Ombudsman's advice remains impartial, but also that the Ombudsman's assistance work does not bias his/her advocacy work. In practice, this means that the Ombudsman will make use of a panel of specialist ADR providers for parties to choose from to progress their dispute.

Not providing assistance

Should the Ombudsman decide not to provide assistance, he/she is required to set out the reasons for that decision in writing. Requests can be declined on the basis of, for example, the request being made more than 12 months after the applicant became aware of the action, or the request not being made in good faith. Requests can also be declined if the person does not have a sufficient interest in the issue; that is, they are too far removed from the issue (refer s68 for full circumstances where a request can be declined).

Certain decisions taken by the Ombudsman can be appealed by application to the Administrative Appeals Tribunal (refer s92).

Under what authority will the Ombudsman operate?

Authority for Commonwealth legislation establishing the Ombudsman and outlining its powers and functions comes from section 51 of the Constitution. Under s51(xx), the Commonwealth has power to legislate in relation to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. This is generally known as the 'corporations power', and has been broadly interpreted since the 1920s case of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*. This grants the Ombudsman power to provide assistance in the event of a request relating to a relevant action taken by a corporation.

The Bill also draws on s51(i) international and interstate trade and commerce, (xiii) banking, (xiv) insurance, and (xviii) copyrights and trademarks, to allow the Ombudsman to provide assistance and investigate policies and practices in these areas.

Whilst s109 of the Constitution allows Commonwealth legislation to override legislation made by the States or Territories that is inconsistent with Commonwealth legislation, the Bill to establish the Ombudsman and outline its powers and functions is not intended to invalidate State and Territory legislation (refer s39) relating to dispute resolution in particular. The intention is that the Ombudsman will complement, and not duplicate, existing dispute resolution mechanisms at both Commonwealth and State and Territory levels.

How will the Ombudsman work with existing services?

The Ombudsman will necessarily need to work closely with existing services. Where an inquiry comes in that falls under the responsibility of an existing service, the Office of the Ombudsman must refer the enquiry to the relevant body for appropriate action (refer s69). Additional governance arrangements, such as memoranda of understanding (MOUs) or an exchange of letters, would underpin this process.

This is particularly the case in relation to the Ombudsman's dispute resolution function. The Ombudsman is largely intended to operate as a Commonwealth-level 'conciierge' for dispute resolution, directing businesses to the most appropriate Government body. For example, concerns regarding unfair market practices are likely to be referred to the ACCC which monitors compliance with Australian competition, fair trading, and consumer protection laws.

It is likely that the Ombudsman will be approached by small businesses seeking information about government programmes, services, regulations and reporting obligations. This information is already available through the Government's Single Business Service, which provides targeted advice and support to businesses and intenders via a range of channels, including online through business.gov.au, via phone, and through a national network of advisers and case managers. The Ombudsman will refer appropriate enquiries to this service, relying on appropriate governance mechanisms, such as MOUs, to facilitate these referrals.

Next steps

These materials are part of a public consultation process seeking feedback on the Bill described above.

Interested parties are invited to comment on the Bill.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the Freedom of Information Act 1982, may affect the confidentiality of your submission.

Closing date for submissions: Tuesday, 7 April 2015

Address written submissions to:

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