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Dear Ms Scott,

RE: Australian Small Business and Family Enterprise Ombudsman Bill 2015

Thank you for giving the Office of the NSW Small Business Commissioner (OSBC) the opportunity to comment on the Exposure Draft and Explanatory Memorandum for the *Australian Small Business and Family Enterprise Ombudsman Bill 2015* (the Bill).

Enhancement of the existing Australian Small Business Commissioner (ASBC) role represents a positive opportunity to develop the framework for a highly regarded advocate who can act as a conduit to, and representative for, small business issues at the Federal level. The OSBC does hold concerns however that the legislation is overly prescriptive and onerous which goes against the Commonwealth Government's overarching objective of reducing red tape.

As you are aware, the OSBC was established to advocate on behalf of small businesses in NSW and support small businesses by:

- providing dispute resolution services,
- delivering quality business advice through Small Biz Connect, and
- speaking up for small business within government.

The establishment of the OSBC and the role of the Commissioner was formalised when the *Small Business Commissioner Act 2013* (the SBC Act) commenced on 18 September 2013. This Act evens out the playing field for small businesses in NSW.

I have considered the Exposure Draft Bill and Explanatory Memorandum in close detail and have attached a table at **TAB A** which sets out the OSBC's comments on specific provisions in the Bill. More broadly however the OSBC has several key concerns about the drafting of the Bill which warrant additional reference below.

Operational implications of the Bill

In its current form the Bill is unclear about how referrals between the Ombudsman and the States and Territories will occur in practice and in what instances a conflict will occur with legislation of the States and Territories. The OSBC has concerns about whether the level of service able to be offered to small businesses by other Commonwealth and State-based agencies may be diminished if matters which fall within s35 and s65 of the Bill are not able to be handled expeditiously by that agency due to the fact that the matter may need to first be referred to the Ombudsman.

The Bill is confusing for small businesses or their representatives trying to ascertain whether they should go to a State-based Commissioner for assistance or the Ombudsman. Such a scenario is

of significant concern to the OSBC particularly given the Bill in its current form does not address the ambiguities about how such a situation will be managed.

Advice received from the NSW Crown Solicitor's Office (CSO) advises that the Ombudsman would have concurrent, not exclusive legislative power with respect to those matters that have some territorial connection to NSW. There is a concern about the ambiguity that a small business or their representative may face about which body is best placed to deal with their matter. Consequently it is critical that these issues are addressed in a Memorandum of Understanding unless improved clarity can be included into the Bill. This gives scope for delays and abuse of processes by powerful parties seeking an advantage over struggling small businesses.

Express reference to Small Business Commissioners

There is currently no direct reference in the Bill to the existence of State-based Small Business Commissioners that deliver very similar services to that of the Ombudsman. This is of concern given there is a critical need to ensure that roles and responsibilities are not duplicated between the Ombudsman and the Commissioners. In order to acknowledge that the role and function of State-based Small Business Commissioners exists, a provision should be included at s8(2) of the Bill which makes a direct reference to state-based Small Business Commissioners. This would assist in the explanation to small businesses about key referral bodies and assist in addressing confusion and ambiguity.

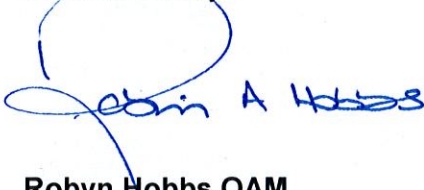
Independence of the Ombudsman

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 independence. 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 question and diminish the Ombudsman's independence from the Government of the day and risks limiting the Ombudsman's ability to be non-partisan.

For the OSBC's comments on the Exposure Draft Bill more broadly please see the attached commentary at **TAB A**.

Thank you for the opportunity to comment. Should you wish to discuss any of the issues raised in this submission further please contact Jane Want, Principal Advocacy Advisor, on (02) 8222 4818 or jane.want@smallbusiness.nsw.gov.au.

Yours sincerely



Robyn Hobbs OAM
NSW Small Business Commissioner

27 March 2015

Provision	Comments	Recommendations
<p>s5 Meaning of a small business</p>	<p>The current definition is too prescriptive and is overly complicated. Of particular concern is the need to 'take part-time staff into account as an appropriate fraction' as per s5(3) when determining whether a business meets the definition of a 'small business' under the Bill. What will occur in the instance that a small business has both casual and part-time employees? How are casual employees calculated?</p> <p>Will staff in the Ombudsman's office be required to ask businesses for evidence of turnover and staff numbers in order to ascertain whether a business meets the requirements of the definition? If so this will have resourcing implications for the office and place an unnecessary regulatory burden on businesses seeking assistance.</p>	<p>Full-time, part-time and casual staff should each be counted as 1 FTE.</p> <p>No evidence should be required.</p>
<p>s8 Meaning of agency of the Commonwealth, a State or a Territory</p>	<p>There is currently no direct reference in the Bill to the existence of State-based Small Business Commissioners that deliver very similar services to that of the Ombudsman. This is of concern given there is a critical need to ensure that roles and responsibilities are not duplicated between the Ombudsman and the Commissioners.</p>	<p>In order to acknowledge that the role and function of State-based Small Business Commissioners exists, a provision should be included at s8(2) of the Bill which makes a direct reference to State-based Small Business Commissioners. Consequently the services provided by the Commissioners are then being captured every time this phrase is referenced.</p> <p>s16(b) which outlines the need to avoid duplication should then cite s8(2) directly so that it clearly links back to this definition.</p>
<p>s14 The Advocacy function (e) to work cooperatively, as far as is possible, with the appropriate agencies of the Commonwealth, States and Territories...</p>	<p>The language "as far as is possible" doesn't give a clear directive that cooperation should be a key priority. This phrase is also used at s16(c); s59 and s70 with regards to cooperation.</p>	<p>The phrase "as far as is possible" should be carved out from the Bill.</p>

<p>Independence of the Ombudsman s20 Directions from the Minister</p> <p>s41(3)(a)(b) Ombudsman report</p> <p>s56(3)(a)(b) Report on an inquiry</p> <p>s63(3)(a)(b) Advice to the Minister</p>	<p>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 independence.</p> <p>The OSBC queries the rigour of the provisions which allow the Ombudsman to publish reports. This is namely due to the fact that the Minister has the ability to delete any information contained in these reports if: (a)(i) the information or recommendation would be likely to adversely affect the interests of any person; and (ii) the Minister reasonably believes that it is in the public interest to delete the information or recommendation; and (b) must delete from the report any confidential information.</p> <p>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.</p> <p>In its current form these provisions question and indeed diminish the Ombudsman's independence from the Government of the day and risks limiting the Ombudsman's ability to be non-partisan.</p>	<p>The OSBC recommends that the Commonwealth could consider amending s41(3); s56(3); and s63(3) of the Bill to include provisions similar to that of s27 of the <i>Small Business Commissioner Act 2013 (NSW)</i> which requires the NSW Small Business Commissioner to give the Minister the opportunity to make submissions in relation to the draft report, however the Commissioner is not required to amend the draft report in light of any submissions made by the Minister. The report instead must indicate that any such objection has been made.</p>
<p>Minister may publish Ombudsman's advice s58 s63(i)</p>	<p>What is the objective of provisions s58 and s63(i) by which the Minister may publish the Ombudsman's advice? Such a provision may be a disincentive to the Ombudsman from providing frank and independent advice.</p>	<p>Provisions should be included which outline in what circumstances the Ombudsman's advice would or would not be made public.</p>
<p>s35 Relevant legislation, policies and practices</p> <p>s64 Promoting best practice</p> <p>s65 Relevant action</p> <p>(c) action by a constitutional corporation that affects a small business</p>	<p>The items listed as falling within the remit of the Ombudsman at s35; s64 and s65, overlap significantly with the matters dealt with by the OSBC.</p> <p>Advice received from the NSW Crown Solicitor's Office (CSO) advises that the Ombudsman would have concurrent, not exclusive legislative power with respect to those matters that have some territorial connection to NSW. There is a concern about the ambiguity that a small business or their representative may face about which body is best placed to deal with their matter.</p>	<p>More detail is required in the Bill (or at a minimum in a Memorandum of Understanding) which addresses how such circumstances would be dealt with operationally in practice.</p>

<p>(d) action by any entity that affects a small business that is a constitutional corporation</p> <p>(e) trade or commerce:</p> <p>(i) among states</p> <p>(ii) between states</p> <p>(f) (i) insurance</p> <p>(ii) banking</p> <p>(iii) telecommunications</p> <p>(iv) copyright, patents, designs, trademarks</p>	<p>Consequently it is critical that these issues are addressed in a Memorandum of Understanding unless improved clarity can be included into the Bill.</p>	
<p>Penalty value</p>	<p>The OSBC queries whether the penalty value used is an adequate deterrent for parties that may breach relevant provisions in the Bill. When the current penalty unit of \$170 is applied the 30 penalty units provided for in the Bill, this equates to a penalty of \$5,100 in total.</p> <p>The Ombudsman may find itself in a position whereby parties in breach of the Bill may opt to pay what is a relatively minimal penalty, as opposed to adhering to the Ombudsman's requests. For example a summons to attend a hearing as per s48 or refusal to answer a question or produce a document s49.</p>	<p>It is recommended that a two-tiered approach be used for penalty units in the Bill. That is one for individuals and one for corporations. For example in s18(2) of the <i>Small Business Commissioners Act 2013 (NSW)</i> 100 penalty units apply to a corporation or 50 penalty units in the case of an individual.</p> <p>The Commonwealth Treasury indicated that the above recommendation is already the case, however there is no reference to such a two-tiered system at any stage in the Bill.</p>
<p>Reporting</p> <p>s40 Quarterly reports to the Minister</p> <p>s23 Annual report</p> <p>s67(3) & s68(2)</p>	<p>The requirement for the Ombudsman to submit a report to the Minister each quarter (s40) in addition to the level of detail required under the annual reporting obligations (s23) pose a significant and indeed onerous administrative burden on the Ombudsman's office.</p> <p>These reporting obligations will require significant resourcing to ensure that an IT platform is available to report on these</p>	<p>An assessment should be made as to whether the Ombudsman's office will have adequate resourcing to report on such items.</p>

	measures, in addition to the time expended collecting such information. Consequently it will be important to ensure that the time spent developing such reports does not outweigh the time spent providing assistance to small businesses.	
s69 Circumstances where the Ombudsman must transfer a request for assistance to another agency	<p>s69 does not expressly require consent and agreement from a Commonwealth or State agency before a matter is referred to them, instead only consultation is required. This is of concern to the OSBC.</p> <p>s69 regularly uses the phrase 'more conveniently or effectively' this is a vague phrase which creates unnecessary ambiguity. It is recommended that this phrase be carved out from the Bill.</p> <p>The Bill doesn't reference any requirement for the Ombudsman to gain authorisation from the small business before a matter is referred to another agency. Such a process is of great importance in order to ensure that the small business' confidentiality is maintained where appropriate.</p>	<p>A provision needs to be inserted which requires that consent and agreement is gained from a Commonwealth or State agency before a matter is able to be referred by the Ombudsman.</p> <p>Remove the phrase 'more conveniently and effectively'</p> <p>Authorisation must be gained from the small business before a matter is referred.</p>
s71(4) & s74 Publishing the names of parties that don't partake or choose to withdraw from the ADR process recommended	<p>What objective is this provision seeking to achieve?</p> <p>The risk that the Ombudsman might publish the names of parties that do not partake or choose to withdraw from the ADR process may limit parties possible future participation with the Ombudsman's office as a result of such a heavy handed approach. This may similarly be a disincentive for small businesses seeking assistance from the Ombudsman due to confidentiality concerns.</p> <p>This provision insinuates that there will be an expectation that the Ombudsman's office will track the course of action taken by parties. Consideration needs to be given to how this will happen in practice if the Ombudsman's office is not managing the ADR process internally.</p>	<p>It is recommended that this provision be removed.</p>
s72 List of ADR providers s73(1)(2) Parties to a dispute to	<p>Under Division 3 of the Bill the Ombudsman is not able to recommend the ADR provider that the parties to a dispute should use. Consequently, how will the parties to the dispute decide upon</p>	<p>The cost of mediation is unclear in the Bill. If the Ombudsman takes a low-cost approach and decides to not subsidise</p>

<p>decide who the mediator is.</p>	<p>the mediator that they will use in practice? In the OSBC's experience, an independent third-party, in this case the OSBC, is effectively able to broker and coordinate such a decision.</p> <p>The Bill does not enable the Ombudsman to monitor the quality of the list of mediator's services nor the prices charged. This level of oversight is necessary in order to ensure that the quality and standard of ADR services is of the highest possible standard.</p> <p>s73 does not link back to and/or reference the use of the list of mediators provided for at s72.</p> <p>The drafting of Division 3 does not align with the description in the Explanatory Memorandum regarding dispute resolution and the role of the Ombudsman.</p>	<p>mediation in any form, small businesses may find themselves in a situation whereby they are unable to utilise the Ombudsman's mediation services due to prohibitive costs.</p>
<p>Subdivision C – Hearings</p>	<p>The OSBC queries whether the Ombudsman's office would have adequate resourcing to manage and administer hearings?</p> <p>Operationally it is only the Minister that is able to request that a hearing be held. Conversely the Ombudsman is not able to initiate a hearing of their own volition.</p> <p>The concept that the Ombudsman is able to hold hearings has an adversarial connotation, particularly for those hearings which are held publicly. This goes against any good will that may be held by the parties to a dispute which may seek assistance from the Ombudsman.</p>	<p>In order to best determine funding levels, costings should be estimated based on the experience of other complaint handling bodies regarding what the resourcing costs may be.</p>
<p>s52 and s53 – Publication of evidence</p>	<p>The instructions at s52 and s53 regarding the public disclosure of evidence and written statements conflict.</p>	<p>Amend these provisions so that there is greater consistency by making s53 subject to s52.</p>