



Simon Cohen
ANZOA Chair
Telecommunications Industry Ombudsman
+ 61 3 86008784 | info@anzoa.com.au

Ombudsmen: the leaders in independent resolution, redress and prevention of disputes

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Manager, Small Business Ombudsman and Programmes Unit
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600
By email: small.business@treasury.gov.au

EXPOSURE DRAFT: AUSTRALIAN SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN BILL 2015

The Australian and New Zealand Ombudsman Association (ANZOA) is the peak body for Ombudsmen in Australia and New Zealand. This submission supplements ANZOA's submission of May 2014 to the Treasury's *Small Business and Family Enterprise Ombudsman Discussion Paper (April 2014)*.

ANZOA welcomes the support for small businesses and family enterprises proposed in the *Australian Small Business and Family Enterprise Ombudsman Bill* (the Bill). However, we cannot support the use of the name 'Ombudsman' for the proposed Small Business and Family Enterprise Ombudsman (SBFEO). The SBFEO is not an Ombudsman and should not, in our view, be called one.

We refer you to ANZOA's policy statement *Essential Criteria for describing a body as an Ombudsman*, published in 2010 (attached and on the ANZOA website www.anzoa.com.au). Drawing from that policy statement, the SBFEO is not an 'Ombudsman' for reasons including the following:

The fundamental role of an Ombudsman is independent resolution, redress and prevention of disputes.

Ombudsmen specialise in dispute resolution — in particular through the receipt, investigation and resolution of citizen or consumer complaints.

For the SBFEO, though, this dispute resolution (or assistance) role appears secondary in nature to the advocacy function. The dispute resolution function is primarily a concierge for complaints function. In addition, to the comparatively minor extent that the SBFEO is involved in dispute resolution, it is a role that is not to be conducted by the Ombudsman a delegate or a SBFEO staff member.

An Ombudsman must not be an advocate for any special interest group, agency or company.

While Ombudsman offices commonly draw on their experience in resolving disputes to provide assistance to complainants and organisations, and to contribute to public policy discussions and consultations, Ombudsmen do not advocate for any of the parties.

The primary function of the SBFEO as set out in the Bill though, is as an advocate for small business. This function includes the conduct of inquiries, the review of proposals and the provision of advice. It is

an important and valuable function. However, by conferral of this advocacy function, it is clear that the SBFEO cannot be an Ombudsman.

Ombudsmen are independent.

Ombudsman independence is a key attribute for effective dispute resolution, and is guaranteed through arrangements such as ensuring the Ombudsman is not subject to direction, is able to select her or his own staff, and has an unconditional right to make public reports.

In a number of areas, the Bill does not provide for these important matters. For example:

- the Bill provides for the Minister to give direction to the SBFEO, and also requires the SBFEO to comply with these directions
- the Bill provides for SBFEO staff and consultants to be made available by the Secretary of the Department, rather than selected by the SBFEO, and
- the Bill provides for the SBFEO to make reports to the Minister, which, in some circumstances, the Minister is not required to publish.

The proposed office is not an Ombudsman.

While the case for a small business advocate is clear, the proposed SBFEO is not an Ombudsman.

The risk of calling this proposed agency an Ombudsman is twofold:

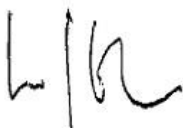
- First, the use of the term 'Ombudsman' to describe the SBFEO may erode the community's trust in Ombudsmen and their function of complaint handling and dispute resolution generally.
- Second, those who deal with the SBFEO will be confused as to its role, as it will not conform to the usual practice of an Ombudsman.

We therefore strongly recommend that the name of this office reflect its primary role of advocating in the interests of small business and family enterprises. Options such as Small Business and Family Enterprise Commissioner or Advocate more accurately describe this proposed body.

Further information

Should you require any further information about the role of Ombudsman, or about this submission, please contact me on 03 8600 8784, or by email at info@anzoa.com.au.

Yours sincerely



Simon Cohen
ANZOA Chair

ESSENTIAL CRITERIA FOR DESCRIBING A BODY AS AN OMBUDSMAN

Policy statement endorsed by the Members of the Australian and New Zealand Ombudsman Association (ANZOA)

The institution of Ombudsman has proven itself adaptable to a variety of roles and settings.

In Australia and New Zealand today, there are several types of Ombudsman offices:

- Parliamentary Ombudsmen who take complaints from citizens and constituents about government agencies
- Other statutory Ombudsmen/Commissioners who investigate complaints about particular agencies or professional services—such as health
- Industry-based Ombudsmen who take complaints from customers of companies providing particular services—such as telecommunications, banking, insurance, investments, energy, water and public transport.

The development and popularity of the Ombudsman institution has come about for one reason—the office is renowned for independent, accessible and impartial review and investigation. In increasing numbers, the public turns to Ombudsman offices for assistance and support.

It is important, therefore, that members of the public are not confused about what to expect when they approach an Ombudsman's office—public trust must not be undermined.

Many of those who approach an Ombudsman feel vulnerable, wish to do so in confidence or make serious allegations or whistleblower complaints.

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 office.

It is a contradiction in terms, for example, to describe a body as an 'internal ombudsman' or to apply the description to a body that is subject to the direction of a government minister or industry body.

The Australian and New Zealand Ombudsman Association (ANZOA) is concerned to ensure appropriate use of the term Ombudsman. Our view is that a body should not be described as an Ombudsman unless it complies with six essential criteria addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

Independence

- The office of Ombudsman must be established—either by legislation or as an incorporated or accredited body—so that it is independent of the organisations being investigated.
- The person appointed as Ombudsman must be appointed for a fixed term—removable only for misconduct or incapacity according to a clearly defined process.
- The Ombudsman must not be subject to direction.
- The Ombudsman must be able to select his or her own staff.
- The Ombudsman must not be—or be able to be perceived as—an advocate for a special interest group, agency or company.
- The Ombudsman must have an unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.
- The Ombudsman’s office must operate on a not-for-profit basis.

Jurisdiction

- The jurisdiction of the Ombudsman should be clearly defined in legislation or in the document establishing the office.
- The jurisdiction should extend generally to the administrative actions or services of organisations falling within the Ombudsman’s jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction—subject only to the contrary ruling of a court.

Powers

- The Ombudsman must be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.
- In addition to investigating individual complaints, the Ombudsman must have the right to deal with systemic issues or commence an own motion investigation.
- There must be an obligation on organisations within the Ombudsman’s jurisdiction to respond to an Ombudsman question or request.
- The Ombudsman must have power to obtain information or to inspect the records of an organisation relevant to a complaint.
- The Ombudsman must have the discretion to choose the procedure for dealing with a complaint, including use of conciliation and other dispute resolution processes.

Accessibility

- A person must be able to approach the Ombudsman’s office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman’s investigation of a complaint.
- Complaints are generally investigated in private, unless there is reasonable justification for details of the investigation to be reported publicly by the Ombudsman—for example, in an annual report or on other public interest grounds.

Procedural fairness

The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness:

- The complainant, the organisation complained about and any person directly adversely affected by an Ombudsman’s decision or recommendation—or criticised by the Ombudsman in a report—must be given an opportunity to respond before the investigation is concluded.
- The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudice.
- The Ombudsman must provide reasons for any decision, finding or recommendation to both the complainant and the organisation which is the subject of the complaint.

Accountability

- The Ombudsman must be required to publish an annual report on the work of the office.
- The Ombudsman must be responsible—if a Parliamentary Ombudsman, to the Parliament; if an Industry-based Ombudsman, to an independent board of industry and consumer representatives.