



Clare Petre
ANZOA Chair
Energy & Water Ombudsman NSW
Phone: + 61 2 8218 5204

22 May 2014

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

**SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN DISCUSSION PAPER
APRIL 2014**

The Australian and New Zealand Ombudsman Association (ANZOA) is a professional association and the peak body for Ombudsmen in Australia and New Zealand.

ANZOA's membership includes Industry-based Ombudsmen, Parliamentary Ombudsmen and other statutory Ombudsmen.

ANZOA is taking the opportunity to make a formal submission to the Treasury's *Small Business and Family Enterprise Ombudsman Discussion Paper* of 30 April 2014. Our formal submission is attached. We would like the submission to be made public.

In summary, ANZOA welcomes the support for small businesses and family enterprises as outlined in the Discussion Paper. However, we submit that the proposed agency is not an Ombudsman and should not be called one.

For further information on the matters ANZOA has raised, please feel free to contact me directly on (02) 8218 5204 or through the ANZOA Secretariat at info@anzoa.com.au.

Yours sincerely

Clare Petre
Chair
Australian and New Zealand Ombudsman Association



**Submission by the
Australian and New Zealand Ombudsman Association
(ANZOA) (May 2014)**

**The Small Business and Family Enterprise
Ombudsman – Discussion Paper (April 2014)**

Introduction

The Australian and New Zealand Ombudsman Association (ANZOA) is a professional association and the peak body for Ombudsmen in Australia and New Zealand. ANZOA's membership includes Industry-based Ombudsmen, Parliamentary Ombudsmen and other statutory Ombudsmen. There is more information about ANZOA and the offices of its members at: www.anzoa.com.au

We appreciate the opportunity to comment on the proposed Small Business and Family Enterprise Ombudsman. We request that our submission be made public.

In summary, ANZOA welcomes the support for small businesses and family enterprises as outlined in the Discussion Paper. However, we submit that the proposed agency is not an Ombudsman and should not be called one.

Assistance to small business and family enterprise

ANZOA supports the aim outlined in the Discussion Paper of providing a voice for small business and family enterprise.

In our experience, small businesses are often at a disadvantage in resolving disputes, particularly where the dispute involves a large business/corporation or a government agency. Small businesses usually comprise an owner and a small number of staff, sometimes family members. They generally do not have access to in-house accountancy or legal advice, and if they have to seek this externally it is a considerable impost on their business.

The offices of the Ombudsmen who are ANZOA members already handle complaints raised by small businesses/family enterprises in a range of areas — including their dealings with government agencies and with telecommunications, financial services, energy and water corporations.

We also have very positive working relationships with existing Small Business Commissioners. To this end, the role clarity as between Ombudsmen and these Commissioners has been enhanced by each office being appropriately named.

Assistance with an appropriate title

ANZOA's submission is essentially in relation to the name of the proposed agency. As outlined in the Discussion Paper, the agency is to be an advocate for small business and family enterprise. As an advocate, it cannot be an Ombudsman.

ANZOA's view is that inappropriate use of the Ombudsman title will create confusion and false expectations for the small businesses and family enterprises the agency aims to assist. Misnaming also has the potential to damage broader community understanding of an Ombudsman's role. These outcomes would be to the detriment of both the new agency and Ombudsmen more generally.

Whether it's the small business/family enterprise or the large government agency/commercial enterprise, each party to a dispute will, quite rightly, have particular expectations of an Ombudsman — from their previous experience of external dispute resolution through an Ombudsman office, or through broader community understanding of how Ombudsmen operate. One of their most important expectations will be that the agency will be an independent arbiter/conciliator of disputes, not take sides or act as an advocate for one of the parties.

We therefore strongly suggest that the new agency be given a title which accurately reflects its aims and functions. Appropriate titles may include:

- Small Business and Family Enterprise Advocate
- Advocate for Small Business and Family Enterprise
- Commissioner for Small Business and Family Enterprise
- Small Business and Family Enterprise Commissioner
- Inspector General for Small Business and Family Enterprise.

Any of these titles would better reflect the role of the agency as envisaged by the Minister for Small Business, the Hon Bruce Billson MP, in his foreword to the discussion paper:

Small businesses need a voice to work through and raise matters of concern which are creating unnecessary barriers to doing business.

Distinguishing the Ombudsman model

ANZOA supports consumers having access to a range of dispute resolution mechanisms that are appropriate to the consumer context. However, it is crucial that Ombudsman offices are differentiated from other complaint handling and dispute resolution mechanisms.

Ombudsman is a particular model of alternative dispute resolution and one that has proven itself adaptable to a variety of roles and settings. With a history going back over 200 years, the Ombudsman model is well-known for independence from all parties in dispute and impartial review and investigation.

In 2010, ANZOA called for stronger controls on use of the term Ombudsman. It supported that call with a policy statement setting out six essential criteria, which the public are entitled to expect of any body that is described as an Ombudsman — independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

These *Essential criteria for describing a body as an Ombudsman* are included as Attachment 1. We note that they are quoted in the Discussion Paper and they are also published on ANZOA's website: www.anzoa.com.au

ANZOA's view is that a body should not be described as an Ombudsman unless it complies with these six essential criteria.

As ANZOA observed in 2010, where problems arise in an industry or an area of government services, the call for an Ombudsman commonly follows. This in itself is not a problem — indeed it is a testament to the high level of public respect for the independence, integrity and impartiality of Ombudsman offices. ANZOA's concern, then and today, lies with the increasing inappropriate use of the term Ombudsman to describe bodies that do not conform to, or show an understanding of, the accepted Ombudsman model and its 200 year history.

The term Ombudsman is understood by the public as signifying an independent office which primarily has a complaint handling and investigation function. The term does not refer to agencies with regulatory, disciplinary and/prosecutorial functions, or to agencies that provide limited advice or mediation services. And the term does not apply to an advocate — an Ombudsman is not an advocate and an agency which advocates for any particular party is not independent.

The concept of Ombudsman is being stretched and the confidence of the public in the role and independence of the Ombudsman institution is at risk of being undermined and diminished.

In his foreword to the Discussion Paper, Minister Billson states that:

... to make a real difference, the role needs real power and real teeth to drive change and to be a genuine independent advocate for small business ...

As an advocate to Government, the Ombudsman will also contribute to the development of Commonwealth laws and regulations ...

The reference to an advocacy role is emphasised in the responsibilities of the agency:

The Government has outlined the key responsibilities of the Ombudsman are to be a:

- *conciierge for dispute resolution*
- *Commonwealth-wide advocate for small business and family enterprises*
- *contributor to the development of small business friendly Commonwealth laws and regulations; and*
- *single entry-point agency through which Commonwealth assistance and information regarding small business can be accessed.*

The Discussion Paper quotes ANZOA's *Essential criteria for describing a body as an Ombudsman* as including:

- *Be independent (that is, an ombudsman must not be subject to direction, and must not be, or perceived to be, an advocate for any group).*

It is clear from the Discussion Paper that the role for the Small Business and Family Enterprise agency is as an advocate — both in reality and perception. As such, it does not meet the independence criterion outlined above. 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.

Independence and impartiality are fundamental Ombudsman principles. If an Ombudsman takes on an advocacy role, it undermines the trust of the parties who are in dispute and the trust the wider community has in the institution of Ombudsman.

Conclusion

The assistance to small businesses and family enterprises as outlined in the Discussion Paper is welcome. However, ANZOA strongly submits that the role is not an Ombudsman and should not be called an Ombudsman. We request that consideration be given to another name for the agency, which better reflects its role as an advocate for the interests of small business and family enterprise.

ANZOA's Essential Criteria for describing a body as an Ombudsman

1. 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.

2. 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.

3. 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.

4. 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.

5. 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 prejudgment.
- 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.

6. 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.