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

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THE ASBFEO IS AN ADVOCATE NOT AN OMBUDSMAN

The Australian and New Zealand Ombudsman Association (ANZOA) is the peak body for Ombudsmen in Australia and New Zealand. In making this submission to the *Review of the Australian Small Business and Family Enterprise Ombudsman*, ANZOA addresses the *Review* question, "Are there any challenges in identifying the position as an Ombudsman?". This submission supplements ANZOA's previous submissions of July 2015, April 2015 and May 2014, available on the ANZOA website: <http://www.anzoa.com.au/publications.html>

ANZOA understands the case for a small business advocate and the active advocacy the Australian Small Business and Family Enterprise 'Ombudsman' (ASBFEO) undertakes for small businesses around Australia as part of a published advocacy agenda. However, ANZOA strongly objects to the name Ombudsman to describe the ASBFEO.

I would value the opportunity to discuss ANZOA's concerns with the reviewer and may be contacted on 03 8600 8784 or by email at info@anzoa.com.au.

Ombudsman offices operating in Australia and New Zealand are among the oldest and most respected in the world, highly regarded for their independence, impartiality and fairness of process. They comply with rigorous criteria for independence, jurisdiction, powers, accessibility, procedural fairness and accountability, as articulated in ANZOA's publicly available policy statement *Essential Criteria for describing a body as an Ombudsman*. These essential criteria were published in 2010 on the ANZOA website (www.anzoa.com.au) and have been widely promoted since that time. They are included as an attachment to this submission.¹

Under independence, one of the essential criteria is that *'The Ombudsman must not be, or be able to be perceived as, an advocate for a special interest group, agency or company'*. On this benchmark alone, the ASBFEO fails the Ombudsman test.

Further, under ANZOA's essential criteria:

- *'The Ombudsman must not be subject to direction.'*
- *'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.'*

Each of these requirements for use of the name Ombudsman is directly contradicted by a number of sections of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (ASBFEO Act) (see addendum to this letter).

¹ ANZOA's *Essential Criteria for describing a body as an Ombudsman* are consistent with the *Benchmarks for Industry-based Customer Dispute Resolution (CDR Benchmarks)* re-released by The Treasury in March 2015

The independence of the ASBFEO is also undermined by s30 of the ASBFEO Act, which confers power on the Minister to remove the Ombudsman from office.

There are no comparable provisions to those in the *Ombudsman Act 1976*, establishing the role of Commonwealth Ombudsman (or in comparable State and Territory legislation). Indeed, provisions of that kind would make a public sector Ombudsman ineligible to be a member of ANZOA or the International Ombudsman Institute.

The fundamental role of an Ombudsman is independent resolution, redress and prevention of disputes. The offices of ANZOA's members specialise in dispute resolution. To present advocacy as the pivotal role of an Ombudsman is misleading and confusing for the public. ANZOA believes it is also damaging to the longstanding and accepted Ombudsman model. It creates an incorrect expectation that any Ombudsman presented with an unresolved dispute will advocate for one of the parties.

In the case of the ASBFEO, misuse of the term Ombudsman is amplified by relegation of the ASBFEO's role in dispute resolution to one of assistance, advice and referral. It is a 'concierge' function, with complainants directed to another body (often a genuine Ombudsman) for the process of dispute resolution. An Ombudsman is not a 'concierge' for dispute resolution.

ANZOA restates its strong objection to the use of the description Ombudsman for a role which is, in its stated intent and its operation, an advocate for small business. Language is important. The office and position should be changed to reflect the nature of the office.

Yours sincerely



Judi Jones
ANZOA Chair

Addendum:
Sections of the ASBFEO Act which directly contradict independence principles

Attachment:
ANZOA's policy statement *Essential Criteria for describing a body as an Ombudsman*

ADDENDUM

Independence principles, which feature universally in the office of Ombudsman, are directly contradicted by the following sections of the ASBFEO Act:

- 20.** The Minister may give written directions of a general nature to the Ombudsman about the performance of the Ombudsman's functions, and the Ombudsman must comply with the directions.
- 21.** The Minister may direct the Ombudsman to give a specified report to the Minister and the Ombudsman must comply with the direction.
- 41.** The Minister has a discretion as to whether to publish all or part of the quarterly reports the Ombudsman is required to give to the Minister, and on public interest grounds the Minister may delete any information from the published report.
- 42.** The Minister can require the Ombudsman to conduct an inquiry into a matter referred by the Minister, can impose requirements as to how the inquiry will be conducted and reported to the Minister, and can terminate the inquiry at any time prior to receiving the Ombudsman's report.
- 56.** The Minister must table the Ombudsman's report of an inquiry in the Parliament, but on public interest grounds may delete any information from the tabled report.
- 57.** The Minister can require the Ombudsman to provide advice on a matter, can impose requirements as to how the advice will be provided, and can terminate the request for advice at any time prior to receiving the Ombudsman's advice.
- 58.** The Minister may publish the Ombudsman's advice, and on public interest grounds may delete any information from the published advice.
- 62.** The Minister can require the Ombudsman to provide advice on a proposal for relevant legislation, policies and practices, can impose requirements as to how the advice will be provided, and can terminate the request for advice at any time prior to receiving the Ombudsman's advice.
- 63.** The Minister may publish the Ombudsman's advice, and on public interest grounds may delete any information from the published advice.

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.