

Our ref:

13 April 2017

Ms Su McCluskey
Ombudsman Review
Small Business Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted electronically

Dear Ms McCluskey

Review of the Australian Small Business and Family Enterprise Ombudsman

Thank you for the invitation to provide a submission to the Review of the Small Business and Family Enterprise Ombudsman.

Please find attached the Commonwealth Ombudsman's submission.

Yours sincerely



Richard Glenn
Acting Ombudsman

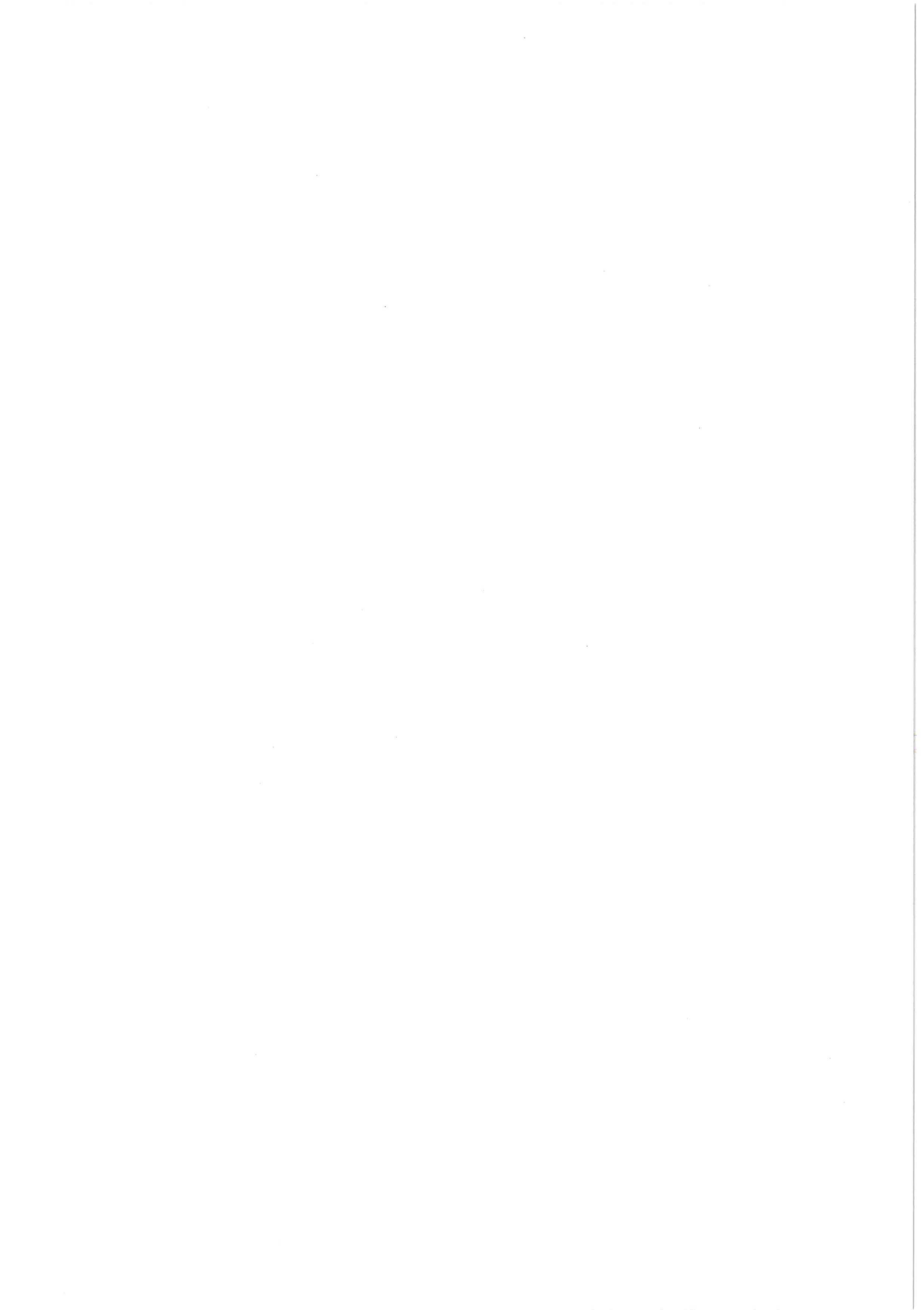


Submission by the
Commonwealth Ombudsman

**REVIEW OF THE AUSTRALIAN SMALL
BUSINESS AND FAMILY ENTERPRISE
OMBUDSMAN**

Submission by the Acting Commonwealth Ombudsman, Richard Glenn

April 2017



INTRODUCTION

The Australian Small Business and Family Enterprise (SBFE) Ombudsman was established on 11 March 2016 and replaced the previous Australian Small Business Commissioner. The SBFE has continued to play an important role in supporting small business and family enterprises in Australia.

On the 15 March 2017, the Government released a discussion paper (the Discussion Paper) to review the efficient and effective operations of the SBFE Ombudsman. In particular, the review will examine the assistance and advocacy functions set out under the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (the Act) and to make recommendations for any improvements to these functions.

The Commonwealth Ombudsman's office welcomes the opportunity to respond to the matters raised in the Discussion Paper. This submission addresses two of the matters identified under 'Other matters'. That is, the challenges with identifying the position as an 'Ombudsman' and the identification of any challenges or barriers impacting on the Ombudsman's effectiveness in undertaking advocacy and assistance functions.

This office made a submission to the 30 April 2014 Discussion Paper relating to the introduction of the SBFE Ombudsman. The matters raised in that submission are still relevant today and we highlight similar concerns in this submission and encourage the Review to have regard to that submission.

BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Small businesses often contact the Commonwealth Ombudsman to complain about the administrative actions of Australian Government agencies such as the Australian Securities and Investments Commission and Australia Post.

The office of the Commonwealth Ombudsman assesses all complaints received. If an investigation is conducted and the Commonwealth Ombudsman considers that the relevant agency's actions or decisions were wrong or unreasonable in all the circumstances, we can recommend that the agency take action to remedy the problem. The Commonwealth

Ombudsman has limited power to investigate complaints about private individuals or companies¹.

The Commonwealth Ombudsman has worked collaboratively with the SBFE Ombudsman and will continue to do so. Where complaints are received that are more appropriately handled by other agencies we have the powers necessary to transfer them and that extends to the SBFE Ombudsman. We have yet to use our formal powers with the SBFE Ombudsman rather we have worked cooperatively to manage cross jurisdictional matters.

RESPONSE TO TERMS OF REFERENCE

Identify any challenges with identifying the position as an 'Ombudsman'

Identify any challenges or barriers impacting the Ombudsman's effectiveness in undertaking the advocacy and assistance functions

The Ombudsman Title

The Commonwealth Ombudsman continues to be concerned with the use of the term 'Ombudsman' to describe the SBFE Ombudsman. The use of the term Ombudsman has been developed by Ombudsman offices throughout Australia and New Zealand over the last 40 years.

The Australian and New Zealand Ombudsman Association (ANZOA), of which the Commonwealth Ombudsman is a member, is acknowledged as the peak body for Ombudsmen in Australia and New Zealand. In 2010, ANZOA released a policy statement outlining the essential criteria for describing a body as an Ombudsman in light of the globally accepted Ombudsman model and its 200 year history. In summary, ANZOA's policy is that a body must:

- be **independent** – an ombudsman must not be subject to direction, and must not be, or able to be perceived to be, an advocate for any group
- have a clearly defined **jurisdiction**
- have sufficient **powers** to investigate matters within its jurisdiction, both in relation to individual complaints and systemic issues
- be **accessible**
- afford **procedural fairness** – the actions of the ombudsman must not give rise to a reasonable apprehension of partiality, bias or prejudgement, and
- be **accountable**.

¹ The Commonwealth Ombudsman can investigate complaints about goods and services delivered by contractors for and on behalf of the Australian Government. In addition, the Postal Industry Ombudsman (PIO) can investigate complaints about companies registered with the PIO scheme and the Overseas Students Ombudsman can investigate complaints about registered private education providers.

The SBFE Ombudsman does not meet these criteria and therefore should not be described as an Ombudsman.

For instance, a central role of the SBFE Ombudsman is to advocate for the interests of small business. A body that is fundamentally concerned with advocacy for a particular group cannot fall within the definition of an Ombudsman, as it is not considered sufficiently independent. An independent and impartial Ombudsman cannot be an advocate for either a complainant or Government. If an Ombudsman takes the role of advocate it undermines the trust of both parties in a dispute. Further, the efficacy of a private sector industry Ombudsman relies on strict independence and impartiality. This advocacy role is clearly at odds with the ability to be independent and seen to be impartial.

The stretching of the concept of Ombudsman has the potential to diminish the Australian public's confidence in the role and independence of the Ombudsman institution as a whole. Over the last 40 years, all Australian jurisdictions have established an Ombudsman, and in more recent times, a number of private sector industry Ombudsmen have also been created. Successive governments in all jurisdictions have invested in the public perception of the 'Ombudsman' brand. This public perception is a critical element of the success of the Ombudsman offices and careful application of the Ombudsman name in the future will ensure that this is preserved.

Alternative Titles

The use of the term 'Ombudsman' to describe the functions of the SBFE Ombudsman is misleading. It clearly does not satisfy the fundamental requirements of an Ombudsman as defined by ANZOA.

To more accurately describe the true function and role of the SBFE Ombudsman, without diminishing the concept of the Ombudsman, we again suggest that a more appropriate title may include:

- Small Business and Family Enterprise Advocate
- Small Business and Family Enterprise Authority
- Agent-General of Small Business and Family Enterprise, or
- Inspector-General of Small Business and Family Enterprise.