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AUSTRALIAN SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN
BILL 2015
AUSTRALIAN SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN
(CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2015

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Small Business, the Hon Bruce Billson MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ACCC	Australian Competition and Consumer Commission
ADR	Alternative dispute resolution
ASBFE Ombudsman	Australian Small Business and Family Enterprise Ombudsman
Bill	Australian Small Business and Family Enterprise Ombudsman Bill 2015
Commissioner	Australian Small Business Commissioner
Consequential and Transitional Provisions Bill	Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015
Constitution	<i>Commonwealth of Australia Constitution Act 1900</i>
Department	Department of the Treasury
GDP	Gross Domestic Product
Minister	Minister responsible for small business
MOU	Memorandum of understanding
Ombudsman	Australian Small Business and Family Enterprise Ombudsman
RBM	Regulatory Burden Measure
RIS	Regulation Impact Statement
Secretary	Secretary to the Treasury
Small business/es	Small business/es and family enterprise/s

General outline and financial impact

Australian Small Business and Family Enterprise Ombudsman

The Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Bill) addresses the relationship between Commonwealth laws, and state laws. The Bill, in several places (sections 39, 54 and 78), indicates that nothing in the Bill allows certain powers under the Bill to be exercised to the extent that it would impair the capacity of any state to exercise its constitutional powers.

Date of effect: The Ombudsman will commence operations on a date to be proclaimed.

Proposal announced: In 2013, the Government announced it would create a Small Business and Family Enterprise Ombudsman with ‘real power’:

- ‘a Commonwealth-wide advocate for smaller enterprises’;
- ‘a single entry-point agency to access Federal small business programmes and support’;
- ‘a contributor to making Commonwealth laws and regulations more small business friendly’; and
- ‘a concierge for dispute resolution’ (including ‘its own mediation service’).

The single entry-point initiative will now form part of the Government’s single access point for business information, services and assistance, which is part of the Government’s Digital Transformation Agenda. The Ombudsman, in the Ombudsman’s concierge role, will direct people to information about accessing Commonwealth small business and family enterprise programmes and support.

The specific legislative model for this Ombudsman with ‘real power’ was announced by the Minister for Small Business (Minister) on 18 August 2014.

Financial impact: Funding of \$8 million over four years was allocated in the 2014-15 Budget for the creation and ongoing expenses of the Ombudsman. The expenditure profile is:

<i>2014-15</i>	<i>2015-16</i>	<i>2016-17</i>	<i>2017-18</i>
\$2.0m	\$2.0m	\$2.0m	\$2.0m

Human rights implications: This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 11.

Compliance cost impact: The creation of the Ombudsman is expected to result in net regulatory savings of \$0.007 million per year.

Summary of regulation impact statement

Regulation impact on business

The Bill establishes an Ombudsman and specifies the functions and powers of the Ombudsman. The Ombudsman has both advocacy and assistance functions.

Impact: The Ombudsman will lead to a net reduction in the regulatory burdens faced by businesses of \$0.007 million per year. Broader net economic benefits to businesses are estimated to be \$18.209 million per year.

Main points: As part of the advocacy function, the Ombudsman will undertake research and inquiries into legislation, policies and practices affecting small businesses and family enterprises. This advocacy function is supported by powers, under which the Ombudsman can require persons give evidence at hearings and provide information/documents, for the purpose of assisting the Ombudsman's research and inquiry activities. The costs of complying with these requirements are not included under the Regulatory Burden Measure (RBM) framework.

The economic costs to those who prepare for, and participate in, the Ombudsman's advocacy-related research and inquiry activities are estimated to be \$0.186 million per year.

The Ombudsman's assistance function will include responding to requests for assistance by referring requests to the appropriate Commonwealth, state or territory agency; or, if the request for assistance relates to a matter within the Ombudsman's remit, recommending how the dispute may be

managed — including recommending an alternative dispute resolution (ADR) process.

The assistance function is supported by information-gathering powers and the ability to publicise that an entity has refused to engage in, or has withdrawn from, a recommended ADR process. This function is expected to result in fewer disputes being pursued through the Federal Court system. For these cases, the time taken to apply to court is considered a regulatory saving and included in the RBM framework.

Broader net economic costs associated with the Ombudsman's assistance function include staff time and out-of-pocket expenses relating to participating in an ADR process. Economic savings relate to avoided court costs, where a dispute was resolved through the Ombudsman's assistance function rather than through a court. The net economic savings from the Ombudsman's assistance function is estimated to be \$18.395 million per year.

Chapter 1

Background

Outline of chapter

- 1.1 Chapter 1 explains the background to the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Bill).
- 1.2 The Bill establishes the Australian Small Business and Family Enterprise Ombudsman (Ombudsman), and specifies the powers and functions of the Ombudsman.

Context of new powers

Background to the Ombudsman

- 1.3 Small businesses and family enterprises play a large role in the Australian economy. The Australian Bureau of Statistics (which uses a small business definition of less than 20 employees) has indicated that small businesses represent approximately 97 per cent of all Australian businesses and employ around 4.6 million Australian people. Many small businesses are also family enterprises, which represent approximately 70 per cent of all Australian businesses.
- 1.4 Small businesspeople face many challenges as they seek to expand their businesses. Family enterprises share these challenges, and face other challenges as well because of the particular nature and characteristics of family enterprises.
- 1.5 Small businesses and family enterprises need a strong advocate who can represent their interests. A strong advocate can help small businesses and family enterprises by advocating on, for example, red tape, taxation and other issues and problems that they may face.
- 1.6 Small businesses and family enterprises are often treated as though they were big businesses with all resources possessed by big businesses.
- 1.7 The Australian Government is committed to a general deregulation agenda, which will ensure that Commonwealth legislation and regulations are business friendly and especially small business and family enterprise friendly.

1.8 A good regulatory regime can make a difference to the productivity of businesses, and decisions about when, or whether, a business should proceed with an investment. A university study in 2012, found that small businesses in Australia were spending around \$28,000 and nearly 500 hours a year working on red-tape and compliance burdens.

1.9 The Treasury estimated in 2014, that regulatory compliance costs could be as high as five per cent of Gross Domestic Product (GDP). The Productivity Commission estimated that, by removing inefficient regulation, savings of up to 1.6 per cent of GDP could be made, with the benefit to the economy from reducing regulation estimated to be between \$12 billion and \$24 billion a year.

1.10 Activities which the Ombudsman may undertake to reduce the regulatory burden at the Commonwealth level include:

- reducing administrative burdens, for example, by suggesting simplifications to administrative forms and processes;
- minimising the costs businesses incur in complying with regulations;
- providing advice on matters affecting the interactions of small businesses and family enterprises with Commonwealth agencies;
- conducting investigations into industry sectors, in which small businesses and family enterprises face particular problems; and
- making recommendations on practical solutions to reduce burdensome regulation.

1.11 The Ombudsman represents a positive opportunity to establish a highly regarded advocate who will act as a conduit for issues that small businesses and family enterprises face at the Commonwealth level. The Ombudsman will promote a nationally consistent and coordinated approach to these issues.

1.12 The Ombudsman will also play a valuable leadership role in collaborating with the state small business commissioners, other state and territory officials, and peak industry bodies. The Ombudsman will raise the concerns of small businesses and family enterprises in interactions across both the public and private sectors.

1.13 In this expanded role as a Commonwealth-wide advocate for small businesses and family enterprises, the Ombudsman will have information-gathering powers, such as the power to conduct hearings, to be able to investigate matters and make recommendations to Government.

1.14 The Ombudsman will need to be, and be seen to be, impartial. The Ombudsman's advocacy and assistance functions will therefore be entirely separate — and thus there will be no conflict between the functions.

1.15 The Ombudsman's assistance function will include responding to requests for assistance by:

- in the Ombudsman's 'concierge' role, referring requests to another agency of the Commonwealth, a state or a territory;
- working co-operatively with another agency of the Commonwealth, a state or a territory to provide assistance; and
- making recommendations, where the request for assistance relates to a matter within the Ombudsman's remit, about how a dispute may be managed — including making recommendations that an alternative dispute resolution (ADR) process be used. For this purpose the Ombudsman will maintain a published list of ADR providers *[Part 4, subsection 72(1) of the Bill]*. The parties in dispute must always choose their specific ADR provider, or providers, *[Part 4, subsection 73(1) of the Bill]*, but where the parties in a dispute do not have their own preferred ADR provider, the Ombudsman may recommend that they chose 'one or more' ADR providers from a 'group' of suitable ADR providers listed in the Ombudsman's recommendation to undertake ADR *[Part 4, paragraph 71(2)(b) of the Bill]*.

1.16 There is a need for ADR services that are quick, and low-cost to be accessible by small businesses and family enterprises. Unresolved disputes can significantly impact the ongoing viability of small businesses and family enterprises, impairing their capacity to contribute to a productive and competitive economy. The availability of ADR services can help preserve business relationships, and avoid unnecessary and expensive litigation.

1.17 The Ombudsman will have information-gathering powers that will support the Ombudsman's assistance function, enabling the Ombudsman to make inquiries and obtain information in relation to requests for assistance.

Outline of existing arrangements in the Commonwealth, states and territories

1.18 The Australian Small Business Commissioner (Commissioner) commenced operations on 2 January 2013. The Commissioner's role, is not underpinned by any legislation, and is limited to providing advocacy and representation for small business interests and concerns to the Australian Government. The Commissioner has no specific role in relation to family enterprises.

1.19 At the Commonwealth level, there are existing Commonwealth Government agencies such as the Commonwealth Ombudsman and the Australian Competition and Consumer Commission (ACCC), which provide assistance and information to small businesses on certain matters.

1.20 The roles of the existing state small business commissioners in New South Wales, Victoria, Western Australia and South Australia also involve providing assistance and information to small businesses. There are currently no small business commissioners in Queensland, Tasmania, the Australian Capital Territory and the Northern Territory. In the states and territories that do not have a specific small business commissioner, a range of ADR services are, nevertheless, provided to small businesses.

1.21 In relation to family enterprises, there are no existing agencies at the Commonwealth, state or territory level that deal specifically with matters affecting family enterprises.

1.22 The Ombudsman, by working co-operatively with existing Commonwealth, state and territory agencies, will avoid duplicating the services of other agencies, and instead complement the services they provide.

Consultation

1.23 The Government undertook extensive consultations on the establishment of the Ombudsman. A discussion paper was released to specific Commonwealth, state and territory officials in January 2014. The feedback from these officials was considered and taken into account in preparing the public discussion paper on the Ombudsman which was released to the public in April 2014. This discussion paper, on the scope and functions of the Ombudsman, sought public comments to shape the Ombudsman's role. A series of face-to-face consultations with stakeholders was held regarding the discussion paper, and 53 submissions were received.

1.24 After considering the stakeholders' comments, the Government announced, on 18 August 2014, a proposed draft model for the Ombudsman.

1.25 An exposure draft of the Ombudsman legislation, accompanied by related explanatory materials, was released on 11 March 2015. Consultations on this exposure draft included face-to-face meetings and teleconferences. Consultations continued over several weeks with more than 40 different stakeholders, and over 40 submissions from stakeholders were received.

1.26 A wide range of stakeholders participated in the various stages of the consultation process. These included the Commonwealth Ombudsman, the four state small business commissioners, various other ombudsmen, regulators such as the ACCC, community justice centres, dispute resolution centres, industry associations, private entities and individuals.

1.27 The Government has taken stakeholders' views and comments into consideration in developing the draft legislation. Stakeholders' comments, including the issues raised through the consultation processes, have been taken into consideration in the final preparation of the Bill.

Chapter 2

Constitutional basis for the Bill

Outline of Constitutional basis

2.1 Under the Constitution, the Commonwealth does not have any specific small business and family enterprise powers. As a result, different Commonwealth powers support different aspects of the Bill.

2.2 The legislation needs to be linked to specific heads of powers under the Constitution. Consequently the constitutional connection relating to the Ombudsman's advocacy function is set out in section 35, and in section 65 for the assistance function [*Part 3, Division 1, section 35 and Part 4, Division 1, section 65*]. These sections of the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Bill), plus the Constitution's nationhood power, provide the necessary connection between the Ombudsman's functions and the Constitution.

2.3 The Ombudsman's advocacy function relates to 'relevant legislation, policies and practices' [*Part 3, Division 1, section 35*]. The Ombudsman will also provide assistance to small businesses and family enterprises in relation to a 'relevant action'. [*Part 4, Division 1, section 65*]

2.4 The Bill also addresses the relationship between Commonwealth laws and state and territory laws. The Bill specifies that to the extent that state or territory laws are capable of operating concurrently with this Bill, it is not intended to exclude or limit the operation of these laws [*Part 5, Division 1, section 79*]. The Bill also provides that, in relation to aspects of the Ombudsman's advocacy and assistance functions, the Bill will not impair the capacity of a state to exercise its constitutional powers [*Part 3 Division 2, section 39, Part 3, Division 3, section 54 and Part 4, Division 4, section 78*]. The general policy underlying the Bill further provides that the Ombudsman, in performing functions under the Bill, must avoid duplication with Commonwealth, state or territory agencies, and work co-operatively, as far as possible, with these other agencies. [*Part 2, Division 1, section 16*]

2.5 This method of shielding state laws from the operation of the Bill (and section 109 of the Constitution), provides greater assurance than, for example, the method adopted in section 7 of the *Independent Contractors Act 2006*, where specific state legislation was named as excluded from the operation of the *Independent Contractors Act 2006*. This is because state legislation is constantly being repealed, and other state legislation enacted, and such changes might not be reflected in Commonwealth law. State legislation, moreover, is not uniform.

2.6 The problem of inconsistency among the Commonwealth, state and territory levels of government will exist as long as there is no nationally harmonised system. A harmonised system, avoiding duplication and overlap among the Commonwealth, states and territories, would represent a step towards a unified framework for small business matters in Australia. In the absence of a nationally harmonised system of small business laws, the Bill will address the problem of inconsistency, as far as possible, within the limits of the Constitution.

Corporations Power

2.7 The Bill applies to ‘small businesses’ and ‘family enterprises’ some of which are entities that the Commonwealth has power to regulate under its Corporations Power (section 51(xx) of the Constitution), which gives the Commonwealth the power to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. The Ombudsman’s activities and functions extend to situations where constitutional corporations interact with small businesses or family enterprises, regardless of whether the small businesses and family enterprises are themselves incorporated. The Corporations Power of the Constitution supports the provisions of the Bill that deal with any:

- past, present or proposed policies or practices of constitutional corporations, to the extent that they affect or may affect small businesses or family enterprises
[Part 3, Division 1, subsection 35(e)];
- past, present or proposed policies or practices of small businesses or family enterprises that are constituted as, or operated by, a constitutional corporation *[Part 3, Division 1, subsection 35(d)];*
- action by a constitutional corporation that affects, or may affect, a small business or family enterprise *[Part 4, Division 1, subsection 65(b)];* and/or
- action by any entity that affects a small business or family enterprise that is a constitutional corporation.
[Part 4, Division 1, subsection 65(c)]

Example 2.1: Disputes involving a corporation

An unincorporated small business requests assistance from the Ombudsman relating to a dispute it is having with a corporation in the same jurisdiction. If the nature of the dispute does not place it within the remit of another official, then the Ombudsman may deal with the matter.

Example 2.2: Disputes involving a matter dealt with by a state official

A small business retailer is experiencing problems with its retail tenancy agreement. Retail tenancy agreements are dealt with under state law, such as the *Retail Leases Act 1994* (NSW), the *Retail Leases Act 2003* (Vic), the *Retail Shop Leases Act 1994* (Qld), the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (Western Australia), the *Retail and Commercial Leases Act 1995* (South Australia), the *Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998* (Tasmania), the *Leases (Commercial and Retail) Act 2001* (Australian Capital Territory), and the *Business Tenancies (Fair Dealings) Act* (Northern Territory). Such legislation sets out how retail tenancy disputes in the various jurisdictions are to be dealt with. A retail tenancy matter brought to the Ombudsman's attention would therefore be referred by the Ombudsman to the relevant state/territory mechanism for resolution.

Example 2.3: Disputes involving two unincorporated businesses

Two small businesses, both unincorporated, and both in the one state, request assistance from the Ombudsman relating to a dispute they are having with each other. The Constitution does not contain a power to deal with an unincorporated to unincorporated business dispute in a state, and so this dispute cannot be dealt with by the Ombudsman.

Trade and Commerce Power

2.8 Section 51(i) of the Constitution gives the Commonwealth the power to make laws with respect to 'trade and commerce with other countries, and among the States'. The Trade and Commerce Power of the Constitution supports the provisions of the Bill that deal with any:

- past, present or proposed policies or practices of any entity, to the extent that those policies or practices affect, or may affect, small businesses or family enterprises in the course of trade or commerce:
 - between Australia and places outside Australia; or
 - among the states; or
 - within a territory, between a state and a territory, or between 2 Territories. [Part 3, Division 1, subsection 35(e)]; and/or

- action by any entity that affects, or may affect, a small business or family enterprise in the course of trade or commerce:
 - between Australia and places outside Australia; or
 - among the states; or
 - within a territory, between a state and a territory or between two territories. *[Part 4 Division 1, subsection 65(d)]*

Example 2.4: Disputes involving an interstate matter

A small business in one state requests assistance from the Ombudsman, relating to a dispute it is having with another business located in another state, about the non-delivery of goods. Whether these businesses are incorporated or not is irrelevant. Being a matter of interstate trade, the Ombudsman could deal with this matter.

Territories Power

2.9 The Territories Power allows the Commonwealth to make laws for the government of any territory (section 122 of the Constitution). The Territories Power of the Constitution supports the provisions of the Bill that deal with:

- past, present or proposed legislation, policies or practices of territory agencies, to the extent that they affect or may affect small businesses or family enterprises *[Part 3, Division 1, subsection 35(b)]*;
- past, present or proposed policies or practices of any entity, to the extent that they affect or may affect small businesses or family enterprises:
 - that are operated by an individual or individuals resident in a territory; or
 - that are, or are operated by, a body corporate or body corporates, the principal place of business of which is in a territory; or
 - that are located in a territory *[Part 3, Division 1, subsection 35(g)]*; and

- an action by or that affects or may affect a small business or family enterprise:
 - that is operated by an individual or individuals resident in a territory; or
 - that is, or is operated by, a body corporate or body corporates, the principal place of business of which is in a Territory; or
 - that is located in a territory. *[Part 4, Division 1, subsection 65(f)]*

Other powers

2.10 The Bill, where an action is by, affects, or may affect a small business or family enterprise, relies on constitutional powers that deal with:

- past, present or proposed policies or practices of any entity in relation to one or more of the following:
 - insurance;
 - banking;
 - telecommunications;
 - copyright, patents, designs or trademarks *[Part 3, Division 1, subsection 35(f)]*;
- to the extent that those policies or practices also affect, or may affect, small businesses or family enterprises; and/or
- action in relation to one or more of the following:
 - insurance;
 - banking;
 - telecommunications;
 - copyright, patents, designs or trademarks. *[Part 4, Division 1, subsection 65(e)]*

2.11 Other Commonwealth powers apply to the sections of the Bill which give the Ombudsman information-gathering powers, to the extent that these powers relate to, for example, provisions of the *Crimes Act 1914* or *Criminal Code*, these powers rely on the Commonwealth powers supporting those criminal laws.

Chapter 3

Preliminary

Outline of chapter

3.1 This chapter sets out the objects of the Bill, when the Bill will commence, definitions, and a simplified outline of the Bill. It should be noted that, while the simplified outline is included to assist readers to understand the substantive provisions of the Bill, the outline is not intended to be comprehensive. *[Part 1, section 3]*

Detailed explanation of new law

Object

3.2 The Bill establishes the Australian Small Business and Family Enterprise Ombudsman with advocacy and assistance functions.

Commencement

3.3 Section 1 (the name of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* *[Part 1, section 1]*), and Section 2 (the commencement provisions), will both commence on the day the Bill receives Royal Assent. Sections 3 to 96 of the Act will commence on a day to be fixed by Proclamation. *[Part 1, section 2]*

Application

Definitions

3.4 Definitions are included in section 4 of the Bill. *[Part 1, section 4]*

3.5 The Bill defines ‘alternative dispute resolution processes’ broadly as including:

- conferencing; and
- mediation; and

- neutral evaluation; and
- case appraisal; and
- conciliation; and
- prescribed procedures or services.

3.6 The Ombudsman may recommend that alternative dispute resolution (ADR) processes be undertaken (section 71), however the Ombudsman, delegates of the Ombudsman, the Ombudsman's staff, and consultants engaged for the Ombudsman, will not conduct any alternative dispute resolution processes [*Part 4, Division 3, subsection 73(2)*], which will instead be conducted by alternative dispute resolution providers through the Ombudsman's outsourced dispute resolution function. It should also be noted that the Constitution restricts the exercise of Commonwealth judicial power to the Federal Court system.

Meaning of a small business and family enterprise

3.7 There are many existing definitions of small business used within government. The recent report of the Productivity Commission on *Regulator Engagement with Small Business* warned against governments imposing a single definition of small business, and stated that 'Policy makers and regulators are best placed to define a small business in ways that are practical and appropriate for their regulatory area.'

3.8 In the Bill, a small business is defined as a business with fewer than 100 employees or revenue under \$5 million in the previous financial year [*Part 1, section 5*]. Including this definition will provide the Ombudsman with a clear remit, and provide clarity to the public on the extent of the Ombudsman's role.

3.9 Family enterprise is an extremely diverse component of the business sector and can be particularly difficult to define. The report of the Joint Parliamentary Committee on *Family Businesses in Australia* noted that no official definition exists, although organisations have applied particular definitions at various times for the purpose of gathering information on the sector. Family enterprises, nevertheless, often have unique characteristic traits and face unique challenges.

3.10 While it appears from surveys that many family enterprises are small businesses, there are also medium-sized and large family enterprises. The Bill focuses on a subset of these businesses and defines a family enterprise for the purposes of the Ombudsman as one which meets the definition of small business in the Bill. [*Part 1, section 6*]

Meaning of action

3.11 The definition of ‘action’ relates to the Ombudsman’s assistance function and the constitutional connection associated with the meaning of ‘relevant action’, in section 65 of the Bill. As part of its assistance function, the Ombudsman is to give assistance in relation to relevant actions. Actions include the following:

- an activity or series of activities;
- a project, development or undertaking;
- making a decision or recommendation;
- formulating a proposal;
- requiring that communications with an entity be in a particular manner or form;
- an alteration of any of the things, including decisions, proposals and requirements; and
- failure or refusal to do any of the things mentioned in dot points above. *[Part 1, section 7]*

Meaning of agency

3.12 ‘Agency’ of the Commonwealth, a state or a territory is defined in section 8 and relates to various aspects of the Bill. *[Part 1, section 8]*

3.13 Firstly, it is used to define the scope of the advocacy and assistance functions. ‘Relevant legislation, policies and practices’ (in respect of the Ombudsman’s advocacy function) include past, present or proposed legislation, policies or practices of a Commonwealth or a territory agency (subsections 35(a) and (b)) and ‘relevant action’ (in respect of the Ombudsman’s assistance function) includes an action by an agency of the Commonwealth that affects, or may affect, a small business or family enterprise (subsection 65(a)). Secondly, it is used in section 69 to define the circumstances in which the Ombudsman must transfer a request for assistance to another agency. Thirdly, it is used in section 70 to define the circumstances in which the Ombudsman may work co-operatively with another agency to give assistance. Fourthly, the secrecy provisions refer to certain agencies to which information may be disclosed (sections 86 and 91).

3.14 The Bill is intended to cover a wide range of agencies, to ensure that the functions of the Ombudsman are not duplicating the functions of other Commonwealth, state or territory officials. The term ‘agency’ is very broad and includes a department of state or a local government body. It also includes any other agency, authority or body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth, a state or a territory. Additionally, any entity (whether incorporated or not) may be prescribed as an agency for the purposes of the Bill. *[Part 1, section 8]*

Meaning of *confidential* information

3.15 The definition of confidential information is in section 9 of the Bill. *[Part 1, section 9]*

3.16 Aspects of the Ombudsman’s functions under the Bill involve the use of confidential information. Provisions in the Bill seek to protect confidential information by, for example, requiring the Ombudsman to delete any confidential information before publishing advice to the Minister as the result of a review *[Part 3 Division 6 section 63]*. The definition in section 9 involves a subjective test of what constitutes confidential information. Information is ‘confidential’ if the decision maker (the person required or permitted to table, publish or otherwise make publicly available the information) is satisfied that:

- the disclosure of the information would cause undue distress or embarrassment to the person;
- the information is commercial-in-confidence; or
- the disclosure of the information would be contrary to the public interest.

3.17 A decision maker may be satisfied that the information is commercial-in-confidence, under subsection 9(2). Matters to be taken into account by the decision maker are: that the information could unreasonably affect the person or a business or action related to the person in an adverse manner; the information is not in the public domain; the information is not required to be disclosed under another law; and, the information is not readily discoverable. *[Part 1, subsection 9(2)]*

3.18 The Ombudsman’s ability to make information publicly available is an important part of having an Ombudsman with real power, however, this objective has been balanced in the Bill with the need to ensure that confidential information is protected.

Extension to Territories

3.19 The Bill will bind the Crown [*Part 1, section 10*] and will extend to every external Territory, including: Norfolk Island, the Territory of the Cocos (Keeling) Islands, and the Territory of Christmas Island. [*Part 1, section 11*]

Chapter 4

Australian Small Business and Family Enterprise Ombudsman

Outline of chapter

4.1 This chapter explains: the establishment and functions (including advocacy and assistance functions) of the Ombudsman [*Part 2, Division 1, sections 12 to 15*]. This Chapter also sets out the general policy guidelines underpinning the performance of the Ombudsman's functions; and sets out the terms and conditions of appointment of the Ombudsman (and acting Ombudsman), the Ombudsman's powers of delegation, staffing matters and other governance requirements.

Detailed explanation of new law

The Ombudsman's functions under the Bill

4.2 The Ombudsman has an advocacy function and an assistance function.

4.3 Under the advocacy function, the Ombudsman:

- undertakes research and inquiries into legislation, policies and practices affecting small businesses;
- reports and gives advice to the Minister on those matters;
- contributes to inquiries by others into those matters;
- contributes to developing national strategies on those matters;
- reviews proposals relating to those matters and advises the Minister on them; and
- promotes best practice in dealing with small businesses.

4.4 Under the assistance function, the Ombudsman responds to requests for assistance by an operator of a small business or family enterprise. The Ombudsman will not duplicate the operations of other

agencies and so must transfer a request for assistance to another Commonwealth, state or territory, if that other agency could deal with the request in a more effective and convenient manner. The Ombudsman may also work co-operatively with other agencies of the Commonwealth, the states and the territories if it is more convenient and effective to do so.

4.5 If the request for assistance is more conveniently and effectively dealt with by the Ombudsman, the Ombudsman may recommend that an alternative dispute resolution (ADR) process be undertaken. If an entity does not undertake that process, or withdraws from that process, the Ombudsman may publish that fact. The Ombudsman may keep a list of ADR providers, to assist small businesses and family enterprises in accessing ADR.

4.6 To assist the Ombudsman in carrying out the Ombudsman's functions, the Ombudsman has information gathering powers. Where the Minister directs the Ombudsman to inquire into a matter, this includes the power to conduct, and take evidence in, hearings.

4.7 The functions of the Ombudsman as set out under the Bill extend, as much as possible, the scope of the Government's commitment. They are intended to be flexible and allow the Ombudsman the use of a range of working methods in the performance of these functions [*Part 2, Division 1, section 17*]. The Ombudsman also has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions. [*Part 2, Division 1, section 18*]

4.8 The Ombudsman may delegate, by written instrument, the powers and functions of the Ombudsman to a Senior Executive Service, or an Australian Public Service employee of the Department. [*Part 2, Division 1, section 19*]

4.9 The Minister may, by legislative instrument give written directions to the Ombudsman, but only in relation to general matters. [*Part 2, Division 1, section 20*]

General policy guidelines

4.10 To achieve the Government's election commitment to create an Ombudsman with 'real power' and in light of the deregulation agenda, the general policy guidelines in section 16 of the Bill, set out the main focus of the Bill which is for the Ombudsman to work co-operatively with existing Commonwealth, state and territory agencies in performing its functions, and avoid duplication with the operations of such agencies. This general policy is highlighted throughout the Bill and supports all of the functions of the Ombudsman. [*Part 2, Division 1, section 16*]

Reporting requirements

4.11 To comply with section 46 of the *Public Governance, Performance and Accountability Act 2013*, an annual report must be prepared by the Department and given to the Minister. The annual report must comply with the content requirements listed in the section 23 of the Bill. *[Part 2, Division 1, section 23]*

4.12 The Ombudsman must also prepare specified reports which relate to the Ombudsman's functions, if directed by the Minister. *[Part 2, Division 1, section 21]*

Terms and conditions of appointment

4.13 An Ombudsman is to be appointed by the Governor-General and will hold office on a full-time basis for a period not exceeding five years, and is eligible (if otherwise qualified) for re appointment. *[Part 2, Division 2, section 24]*

4.14 Before the Governor-General appoints the Ombudsman, the Minister must be satisfied that the appointee has demonstrated suitable qualifications or experience, and is of good character for the position. *[Part 2, Division 2, subsection 24(2)]*

4.15 The Minister will be responsible for appointing an acting Ombudsman to undertake the activities of the Ombudsman during the illness or absence of the Ombudsman, or during a vacancy pending permanent appointment of an Ombudsman by the Governor-General. The acting Ombudsman has all the same functions as the Ombudsman. *[Part 2, Division 2, section 32]*

4.16 The Bill provides that the Ombudsman be paid such remuneration as is determined by the Remuneration Tribunal, and paid such allowances as are prescribed by legislative instrument *[Part 2, Division 2, section 25]*. The Ombudsman will also have the recreation leave entitlements as are determined by the Remuneration Tribunal. *[Part 2, Division 2, section 26]*

4.17 The Ombudsman may not, without the Minister's approval, undertake work outside the duties of the office of the Ombudsman *[Part 2 Division 2, section 27]*. The Ombudsman must also disclose to the Minister, all relevant personal interests relating to the functions of the Ombudsman. *[Part 2, Division 2, section 29]*

4.18 The Minister may terminate the appointment of the Ombudsman for ‘misbehaviour’, or if the Ombudsman is unable to perform his or her duties *[Part 2, Division 2, section 30]*. Other circumstances under which the Minister may terminate the Ombudsman’s appointment include if the Ombudsman:

- becomes bankrupt; or
- takes steps to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
- compounds with one or more of his or her creditors; or
- makes an assignment of his or her remuneration for the benefit of one or more of his or her creditors. *[Part 2, Division 2, subsection 30(2)]*

4.19 If the Ombudsman wishes to resign, the Ombudsman must do so in writing to the Minister. *[Part 2, Division 2, section 28]*

4.20 The Ombudsman will report directly to the Minister. As a departmental official, the Ombudsman would be subject to requirements under the *Public Governance, Performance and Accountability Act 2013*. *[Part 2, Division 1, section 22]*

4.21 Consistent with the Government’s smaller government agenda, the Ombudsman will receive corporate system support and staffing from the Department. Use of the Department’s staff and other departmental corporate structures will allow for full and proper functioning of the Ombudsman’s office, including its advocacy and assistance functions. *[Part 2, Division 3, section 33]*

4.22 The Ombudsman may also engage consultants, subject to available resources, to deliver specific and specialised services. *[Part 2, Division 3, section 34]*

Chapter 5

Advocating for small businesses and family enterprises

Outline of chapter

5.1 This chapter explains Part 3 of the Bill which relates to the Ombudsman's advocacy function.

Constitutional connection

5.2 Part 3 Division 1 sets out the connections linking the Ombudsman's advocacy function to the Constitution (see Chapter 2 above, regarding the constitutional basis for the Bill). [*Part 3, Division 1, section 35*]

Ombudsman's own initiative inquiries

5.3 Section 36 of the Bill provides that the Ombudsman may conduct research or make inquiries in relation to relevant legislation, policies and practices [*Part 3, Division 2, section 36*]. The Ombudsman will be able to assess where legislation, policies and practices may be improved to benefit small businesses and family enterprises.

Providing information and documents

5.4 Under section 37 of the Bill, a person may be required by notice to provide information or documents to the Ombudsman which are relevant to the Ombudsman's own initiative research or inquiries. The notice will be in writing and must allow 'at least 10 business days' for the notice to be complied with (this provision is modelled on subsection 48(2) in the *Productivity Commission Act 1998*). The penalty for not complying with a notice is 30 penalty units (a penalty unit is a financial penalty defined in section 4AA of the *Crimes Act 1914*; note that the penalty for corporations may be up to five times higher than that for a 'natural person' under section 4B of the *Crimes Act 1914*). No penalty applies where the person does not have the required information or documents, or is unable to obtain the information or documents despite taking 'all reasonable steps' to obtain them [*Part 3, Division 2, section 37*]. The Ombudsman would not impose any penalty, rather the imposition of a penalty would be a decision of a court.

Documents produced in relation to research or inquiry

5.5 The Ombudsman may take possession of, and make copies of, or take extracts from, documents. The Ombudsman may also keep documents, but only for so long as is necessary for the research or inquiry. The Ombudsman must also allow the documents to be inspected at all reasonable times by people who are entitled to inspect them.

[Part 3, Division 2, section 38]

Limitation on powers

5.6 Nothing in Part 3 Division 2 (research and inquiries on the Ombudsman's own initiative) of the Bill allows a power to be exercised to the detriment of a state being able to exercise its constitutional powers.

[Part 3, Division 2, section 39]

Reports to the Minister

5.7 The reporting that will be required of the Ombudsman, both quarterly and *ad hoc*, is designed to ensure that the Minister receives regular information about the Ombudsman's work. The quarterly reporting requirement mirrors that in other legislation, such as section 60J of the *Competition and Consumer Act 2010*. Quarterly reports are required to be provided within 20 business days after the end of each quarter. The Ombudsman may include recommendations to the Minister in relation to any matter included in the Ombudsman's reports.

[Part 3, Division 2, section 40]

Minister may publish Ombudsman's report

5.8 The Minister may publish a report, or any part of a report, received under section 40 (this is similar to section 18 of the *Productivity Commission Act 1998*). If such publication would adversely affect the interests of any person, the Minister must issue a directive to the Ombudsman to notify that person, and give that person a reasonable period of up to 30 days to make representations about the release of the information. Such a directive is not a legislative instrument. The Bill will give the Minister the power to 'delete any information or recommendation' from a report before it is published, if the information is likely to adversely affect the interests of any person, and the Minister believes it is 'in the public interest' to delete the information or recommendation. The Minister must also delete any confidential information prior to publication. Decisions taken by the Minister 'in the public interest' are subject to review by the Administrative Appeals Tribunal under section 92 of the Bill. *[Part 3, Division 2, section 41]*

Inquiries on referral from the Minister

5.9 Part 3 Division 3 of the Bill provides the Minister to refer inquiries to the Ombudsman in relation to legislation, policies and practices that come within the constitutional reach of the Ombudsman, and affect small businesses and family enterprises.

[Part 3, Division 3, Subdivision A section 42]

5.10 The powers granted to the Minister under subsections 42(2) to (4) are modelled on section 11 of the *Productivity Commission Act 1998*. These powers include the ability to: require the Ombudsman to hold hearings; specify a period in which the Ombudsman must provide a report to the Minister on the inquiry; require the Ombudsman make ‘a draft report available to the public during an inquiry’; and require the Ombudsman to make recommendations. *[Part 3, Division 3, Subdivision A, subsections 42(2) to 42(4)]*

5.11 The Ombudsman must comply with any requirement imposed by the Minister under subsection 42(2) *[Part 3, Division 3, Subdivision A, subsection 42(3)]*. The Minister may withdraw or amend a referral at any time before receiving the report from the Ombudsman *[Part 3, Division 3, Subdivision A, subsection 42(4)]*. This latter provision could be used, for example, in the event that the Minister receives new information that the issue being investigated is no longer of concern.

5.12 When writing a report on a matter referred by the Minister, the Ombudsman has the ability to make recommendations in the report related to any matter relevant to the matter referred. *[Part 3, Division 3, Subdivision A, subsection 42(5)]*

Example 5.1: Inquiry on referral from the Minister

The Minister becomes aware of a significant, national issue affecting small businesses and family enterprises. This issue relates to the policies and practices of corporations that affect small business and family enterprises, and therefore come within the constitutional reach of the Ombudsman (see 35(c) of the Bill). The Minister decides that he needs advice on this issue, and refers the matter to the Ombudsman for inquiry (section 42 of the Bill).

Notices of inquiries and hearings

5.13 ‘As soon as practicable’ the Ombudsman must give notice that an inquiry is to be held, by way of an advertisement ‘published in a newspaper circulating’ in each state and territory

[Part 3, Division 3, Subdivision B, section 43]. This provision is modelled on section 13 of the *Productivity Commission Act 1998*. The Ombudsman must provide reasonable notice of the intention to hold a hearing, the

subject of the hearing, and the time and place of the hearing. Such notices must also be published in a newspaper circulating in each state and territory [*Part 3, Division 3, Subdivision C, section 45*]. These requirements are modelled on section 14 of the *Productivity Commission Act 1998*.

Details of hearings

5.14 The Ombudsman may be required to hold hearings by the Minister, where the Minister has referred a matter to the Ombudsman for inquiry. [*Part 3, Division 3, Subdivision A, paragraph 42(2)(a); Part 3, Division 3, Subdivision C, section 44*]

Procedure at hearings

5.15 Hearings will be held in public, except if the Ombudsman ‘reasonably believes’ that it is ‘in the public interest’ to hold a hearing in private [*Part 3, Division 3, Subdivision C, section 46*]. This requirement is modelled on subsections 15(1) and (2) of the *Productivity Commission Act 1998*.

Providing information and documents

5.16 Under section 47 of the Bill, a person may be required by notice to provide information or documents to the Ombudsman which are relevant to inquiries referred by the Minister to the Ombudsman. The notice will be in writing and must allow ‘at least 10 business days’ for the notice to be complied with. The penalty for not complying with a notice is 30 penalty units. No penalty applies where the person does not have the required information or documents, or is unable to obtain the information or documents despite taking ‘all reasonable steps’ to obtain them. [*Part 3, Division 3, section 47*]

Attendance at a hearing

5.17 The Ombudsman may summon a person in writing to appear at a hearing to give evidence and to produce documents. A penalty of 30 penalty units may apply in the event that a person fails to comply. [*Part 3, Division 3, Subdivision C, section 48*]

5.18 A person who appears as a witness at a hearing must not refuse to answer a question as required by the Ombudsman or produce a document required by the summons. A penalty of 30 penalty units may apply in the event that a person fails to comply. No penalty applies if the person does not have the required information or document, and the person has taken ‘all reasonable steps’ to obtain the required information and document. [*Part 3, Division 3, Subdivision C, section 49*]

Documents produced in relation to inquiry

5.19 The Ombudsman may take possession of, and make copies of, or take extracts from, documents for an inquiry. The Ombudsman may keep the documents for as long as is necessary for the inquiry. The Ombudsman must also allow the documents to be inspected at all reasonable times by people who are entitled to inspect them. *[Part 3, Division 3, section 50]*

Allowances to witnesses

5.20 A person summoned by the Ombudsman to attend a hearing is entitled to be paid by the Commonwealth such allowances and expenses as are prescribed. *[Part 3, Division 3, Subdivision C, section 51]*

Restrictions on publication of evidence

5.21 The Ombudsman may give directions prohibiting or restricting the publication of evidence provided in connection with a hearing. A penalty of 30 penalty units may apply in the event that a person contravenes the directions. *[Part 3, Division 3, Subdivision C, section 52]*

Written statements etc. to be made public

5.22 The Ombudsman must make available to the public, in any way considered appropriate, written evidence or document provided in connection with an inquiry. The Ombudsman must delete any confidential information before making the evidence or document publicly available. *[Part 3, Division 3, Subdivision C, section 53]*

Limitation on powers

5.23 Nothing in Part 3, Division 3, Subdivision C (hearings), of the Bill allows a power to be exercised to the detriment of a state being able to exercise its constitutional powers. *[Part 3, Division 3, Subdivision C, section 54]*

Report of inquiry

5.24 The Ombudsman is required to prepare a written report for the Minister, on a matter referred by the Minister to the Ombudsman for inquiry, unless the referral is withdrawn. *[Part 3, Division 3, Subdivision D, section 55]*

5.25 These reports must be tabled in each House of Parliament ‘within 25 sitting days’ (a provision modelled on section 12 of the *Productivity Commission Act 1998*). If a report ‘would be likely to adversely affect the interests of any person’, the Minister, before tabling the report, must direct the Ombudsman to notify that person and give them a reasonable period (not exceeding 30 days) to respond *[Part 3, Division 3, Subdivision D, subsection 56(2)]*. A direction under subsection 56(2), if made in writing, is not a legislative instrument *[Part 3, Division 3, Subdivision D, subsection 56(5)]*.

5.26 Before the Minister may delete any information or opinion from the report, if the information or opinion would be likely to adversely affect the interests of any person, and the Minister reasonably believes that it is in the public interest to delete the information or opinion *[Part 3, Division 3, Subdivision D, subsection 56(3)]*. The Minister’s decision to delete the information or opinion must take into account any representations made by the person *[Part 3, Division 3, Subdivision D, subsection 56(4)]*. Decisions taken under subparagraph 56(3)(a)(ii) are subject to appeal to the Administrative Appeals Tribunal under section 92 of the Bill. The Minister must also delete any confidential information from the report *[Part 3, Division 3, Subdivision D, subsection 56(3)]*.

Providing advice to the Minister

5.27 Part 3 Division 4 allows the Minister to refer certain matters to the Ombudsman for advice. The Minister’s referral may specify that the advice is to be in writing, the time period the advice is to be provided within, and any matter the Ombudsman is to have regard to when preparing the advice. The Ombudsman must comply with such requirements. *[Part 3, Division 4, section 57]*

5.28 The Minister may publish the advice given by the Ombudsman, in any way considered appropriate. If such publication would adversely affect the interests of any person, the Minister must issue a directive to the Ombudsman to notify that person, and give that person a reasonable period of up to 30 days to make representations about the release of the information. Such a directive is not a legislative instrument. The Bill will give the Minister the power to ‘delete any information or recommendation’ from a report before it is published, if the information is likely to adversely affect the interests of any person, and the Minister believes it is ‘in the public interest’ to delete the information or recommendation. The Minister must also delete any confidential information prior to publication. Decisions taken by the Minister ‘in the public interest’ are subject to review by the Administrative Appeals Tribunal under section 92 of the Bill. *[Part 3, Division 4, section 58]*

National strategies

5.29 The Ombudsman must work co-operatively, as far as is possible, with appropriate agencies to develop national strategies in relation to legislation, policies and practices that affect, or may affect, small businesses or family enterprises. *[Part 3, Division 5, section 59]*

5.30 In developing these strategies, the Ombudsman may provide secretariat or research services to joint Commonwealth, state and territory bodies formed for the purpose of developing the national strategies. *[Part 3, Division 5, section 60]*

Other advocacy functions

Contributing to inquiries into relevant legislation, policies and practices

5.31 One of the Ombudsman's functions will be to contribute to inquiries into legislation, policies and practices, within the Ombudsman's constitutional reach, which affect small businesses and family enterprises. *[Part 3, Division 6, section 61]*

Reviewing proposals relating to relevant legislation, policies and practices

5.32 In 2014 the former Australian Small Business Commissioner produced a report entitled: *ASIO building — the costs of poor contracting practices*. The Ombudsman will expand on this work, and on the Ombudsman's own initiative, or on referral from the Minister, review proposals relating to relevant legislation, policies and practices. Referrals from the Minister may specify, among other things, deadlines for reviews to be undertaken and advice to be provided, and any matters the Ombudsman must consider while carrying out reviews or giving advice. The Ombudsman must comply with these Ministerial directions. *[Part 3, Division 6, section 62]*

Minister may publish advice given as a result of a review

5.33 The Minister may publish the advice given by the Ombudsman under section 62, in any way considered appropriate. If such publication would adversely affect the interests of any person, the Minister must issue a directive to the Ombudsman to notify that person, and give that person a reasonable period of up to 30 days to make representations about the release of the information. Such a directive is not a legislative instrument. The Bill will give the Minister the power to 'delete any information or

recommendation' from a report before it is published, if the information is likely to adversely affect the interests of any person, and the Minister believes it is 'in the public interest' to delete the information or recommendation. The Minister must also delete any confidential information prior to publication. Decisions taken by the Minister 'in the public interest' are subject to review by the Administrative Appeals Tribunal under section 92 of the Bill. *[Part 3, Division 6, section 63]*

Promoting best practice

5.34 The Ombudsman may, on the Ombudsman's own initiative, take steps to promote best practice in interactions between small businesses and family enterprises, and entities within the remit of the Commonwealth Constitution. *[Part 3, Division 6, section 64]*

Chapter 6

Assisting a small business or family enterprise

Outline of chapter

6.1 This chapter explains Part 4 of the Bill which relates to the Ombudsman's assistance function.

Constitutional connection

6.2 Part 4 Division 1 sets out the connections linking the Ombudsman's assistance function to the Constitution (see Chapter 2 above, regarding the constitutional basis for the Bill). *[Part 4, Division 1, section 65]*

Responding to requests for assistance

6.3 Any person may request assistance from the Ombudsman in relation to a 'relevant action' (defined by section 65 of the Bill). Requests may be made orally or in writing. If the request is made orally to the Ombudsman, the Ombudsman may reduce the request to writing; or at any time require the person who made the request to reduce the request to writing. A request for assistance in relation to a relevant action made to the Ombudsman in writing, or reduced to writing, is a 'formal request'. *[Part 4, Division 2, section 66]*

6.4 In certain circumstances the Ombudsman will not be authorised to deal with a request for assistance, such as when the request for assistance relates to an action taken by a Minister of the Commonwealth, a state or a territory; or an action taken by an agency of a state or a territory. Where the Ombudsman does not deal with a request, the Ombudsman must give the person who made the request, a notice in writing setting out the reasons. *[Part 4, Division 2, section 67]*

6.5 Upon receiving a request for assistance, the Ombudsman:

- may decide not to provide assistance *[Part 4, Division 2, section 68]*;

- must transfer the dispute to the appropriate agency [*Part 4, Division 2, section 69*];
- in certain circumstances, may work co-operatively with another Commonwealth, state or territory agency [*Part 4, Division 2, section 70*]; or
- may recommend an alternative dispute resolution (ADR) process. [*Part 4, Division 3, section 71*]

6.6 The Ombudsman may decide not to provide assistance because, for example, the Ombudsman ‘reasonably believes’ that the request for assistance is frivolous or vexatious. Requests for assistance can also be declined on the basis of, for example, the request being made more than 12 months after the applicant became aware of the relevant issue, or if the person does not have a sufficient interest in the issue. Where the Ombudsman makes such a decision, the Ombudsman must give the person who made the request, a notice in writing setting out the reasons. [*Part 4, Division 2, section 68*]

6.7 The Ombudsman must transfer a request (or an aspect of a request), for assistance, to another agency, Commonwealth, state or territory, where the Ombudsman ‘reasonably believes’ that the request could have been made to the other agency, and the request could be more ‘conveniently or effectively’ dealt with by that other agency. The other agency must have the legal power to deal with the request. The Ombudsman must also consult with the other agency before transferring the request. Examples of such other agencies include, but are not limited to, the Commonwealth Ombudsman and the state small business commissioners. When transferring a request, the Ombudsman must give the other agency relevant information and documents. The Ombudsman must also give the person who made the request, a notice concerning the transfer. [*Part 4, Division 2, section 69*]

6.8 The Ombudsman may work co-operatively with other agencies, Commonwealth, state, or territory to provide assistance to small businesses and family enterprises. Additional governance arrangements, for example memoranda of understanding (MOUs), may underpin this process. As part of working co-operatively with other agencies, the Ombudsman may transfer aspects of requests to those other agencies which, when transferred are taken to have been made under the laws granting those other agencies the power to deal with the aspects of the requests. [*Part 4, Division 2, section 70*]

6.9 The requirement to transfer requests for assistance to relevant agencies, forms part of the Ombudsman's 'concierge' function. Once transferred, the requests become the sole responsibility of the agencies to which they have been transferred. Requests for assistance which are not transferred to other agencies, may be, in some cases, referred by the Ombudsman to the Ombudsman's own outsourced alternative dispute resolution service. *[Part 4, Division 3, section 71]*

Example 6.1: Circumstance where the Ombudsman would not provide assistance

A small business seeks assistance from the Ombudsman regarding a corporation that allegedly delayed providing services, thus causing the small business to lose customers. The Ombudsman informed the small business that the appropriate entity to deal with this dispute is a particular agency. The small business approached this agency, but was dissatisfied with the result and so returns to the Ombudsman. The Ombudsman would in these circumstances decline to deal with the matter because the agency is the correct entity to deal with it. The Ombudsman cannot function as a reviewer of other officials' decisions.

Example 6.2: Transferring a request to a state small business commissioner

A small business (whether incorporated or not is irrelevant) in Western Australia seeks assistance from the Ombudsman about what it perceives as unfair market practices. Under Western Australia's *Small Business Development Corporation Act 1983*, the Small Business Commissioner for Western Australia investigates complaints about unfair market practices affecting small businesses, and provides assistance to attempt to resolve those complaints. The Ombudsman therefore consults the Western Australian Small Business Commissioner and, as soon as is reasonably practicable, transfers the request for assistance to that Commissioner, along with any documents gathered in relation to the complaint. The Ombudsman also, as soon as is reasonably practicable, gives the person who made the request, notice that the request, has been transferred to the Western Australian Small Business Commissioner.

6.10 If the Ombudsman is approached to give assistance in a dispute, and the Ombudsman does not transfer a request to another agency, the Ombudsman may make recommendations on how the dispute may be managed. Recommendations by the Ombudsman may involve referring the party, in writing, to ADR. These written notices must include a warning to the parties that if they choose not to undertake, or to withdraw from, the recommended ADR process, the Ombudsman may publish this fact *[Part 4, Division 3, section 71]*. In connection with this, the Ombudsman will publish a list of qualified ADR providers, from which the parties may choose an appropriate ADR provider. *[Part 4, Division 3, section 72]*

6.11 An ADR process recommended by the Ombudsman must not be conducted by: the Ombudsman, delegates of the Ombudsman, the Ombudsman's staff, or consultants engaged for the Ombudsman. This is because the Ombudsman must be seen to be impartial, and therefore the Ombudsman's advocacy and assistance functions must be entirely separate. The 'parties to the dispute' must choose the person who conducts the ADR process. *[Part 4, Division 3, section 73]*

Example 6.3: The Ombudsman recommends ADR

A small business based in one state, is in dispute with a business in another state, over the suitability of services it has been provided with. If no Commonwealth agency could deal with this dispute, and since it involves interstate trade and commerce, it would be within the Ombudsman's remit, regardless of whether the businesses are incorporated. The Ombudsman makes inquiries, and decides that the matter is not a vexatious one, and would benefit from an ADR process. The businesses in dispute do not have their own preferred ADR provider, therefore the Ombudsman may recommend that they choose 'one or more' ADR providers from a 'group' of suitable ADR providers listed in the Ombudsman's recommendation to undertake ADR (paragraph 71(2)(b) of the Bill). This 'group' presumably would be a subset of the published list, of ADR providers, maintained by the Ombudsman (subsection 72(1) of the Bill). The parties in dispute must always choose the specific ADR provider, or providers, that they wish to assist with their dispute (subsection 73(1)).

Publishing failure to participate in an alternative dispute resolution process

6.12 The Ombudsman may publicise, in any way that the Ombudsman thinks appropriate, that an entity has refused to engage in an ADR process recommended by the Ombudsman, or has withdrawn from such a process *[Part 4, Division 3, section 74]*. A decision under subsection 74(1) to publicise that a party to a dispute has refused to engage in, or has withdrawn from, an ADR process is an administrative decision, which can be reviewed by the Administrative Appeals Tribunal (section 92 of the Bill).

Example 6.4: Publishing the failure to participate

The Ombudsman has recommended, by written notice, that a small business, in Coolangatta, Queensland, participate in the Ombudsman's own outsourced ADR service, to resolve a dispute with a business located in adjacent Tweed Heads, NSW, over the late delivery of supplies (it is irrelevant whether these businesses are incorporated). This matter involves interstate commerce, and thus may come under the jurisdiction of the Ombudsman — if it does not come under the

jurisdiction of another Commonwealth agency. The Ombudsman's written notice informs the businesses that if they do not participate in the recommended ADR process, or if they withdraw from the process, then the Ombudsman may publish that fact. One of the businesses refuses to participate in the recommended ADR, and so the Ombudsman publishes that fact.

Gathering information about requests for assistance

6.13 In relation to some requests for assistance, the Ombudsman may make inquiries, for example, to determine whether the requests would fall within the remit of the Ombudsman or more 'conveniently or effectively' be dealt with by another agency. *[Part 4, Division 4, section 75]*

6.14 A person may be required by notice to provide information or documents to the Ombudsman which are relevant to inquiries about requests for assistance. The notice will be in writing and must allow 'at least 10 business days' for the notice to be complied with. The penalty for not complying with a notice is 30 penalty units. No penalty applies where the person does not have the required information or documents, or is unable to obtain the information or documents despite taking 'all reasonable steps' to obtain them. *[Part 4, Division 4, section 76]*

6.15 The Ombudsman may take possession of, and make copies of, or take extracts from, documents. The Ombudsman may also keep documents, but only for so long as is necessary for the inquiry. The Ombudsman must also allow the documents to be inspected at all reasonable times by people who are entitled to inspect them. *[Part 4, Division 4, section 77]*

Limitation on powers

6.16 Nothing in Part 4 Division 4 of the Bill (dealing with assisting a small business or family enterprise) allows a power to be exercised to the detriment of a state being able to exercise its constitutional powers. *[Part 4, Division 4, section 78]*

Chapter 7

General requirements

Outline of chapter

7.1 This chapter explains Part 5 of the Bill, which outlines the general requirements in the Bill, including provisions related to the disclosure of protected information, and the review of certain decisions that may be taken under the Bill.

Concurrent operation of state law

7.2 The Bill, when operational, will not limit any state or territory law where, such law can operate concurrently with the *Australian Small Business and Family Enterprise Ombudsman Act 2015*.
[Part 5, Division 1, section 79]

Secrecy

7.3 Protected information is defined as information relating to the affairs of a small business or family enterprise, disclosed to, or obtained by, a ‘person assisting’ a small business or family enterprise.
[Part 5, Division 2, section 80]

7.4 A person assisting a small business or family enterprise is defined as:

- the Ombudsman;
- a delegate of the Ombudsman;
- a person assisting the Ombudsman under section 33 of the Bill (staff of the Ombudsman);
- a person engaged as a consultant under section 34 (consultants engaged to assist the Ombudsman);
- a person providing an alternative dispute resolution process in connection with a dispute in relation to a relevant action.

[Part 5, Division 2, section 81]

7.5 Unauthorised disclosure, or use, of protected information by a person assisting small business or family enterprise carries a penalty of imprisonment for two years, or 120 penalty units. The intention is that protected information should be handled appropriately. No penalty applies where disclosure of the protected information is authorised by a law of the Commonwealth, a state or a territory. Also, except for the purpose of giving effect to provisions of this Bill, a person assisting a small business or family enterprise is not required to produce documents for, or disclose information to, ‘a court or tribunal’. **[Part 5, Division 2, section 82]**

7.6 A person assisting a small business or family enterprise may disclose or use protected information if the disclosure or use is for the purposes of this Bill or a legislative instrument under this Bill **[Part 5, Division 2, section 83]**. Similarly, the Ombudsman, the Ombudsman’s delegate, and a person assisting the Ombudsman, may disclose information to the Minister and the Secretary (and someone authorised in writing by the Secretary), unless it relates to a request for assistance in relation to a dispute with the Minister/Secretary’s Department. **[Part 5, Division 2, sections 84 and 85]**

7.7 The Ombudsman may disclose protected information to certain agencies, bodies, and persons, such as the Commonwealth Ombudsman. A penalty of imprisonment for two years, or a fine to the value of 120 penalty units, applies to a person in a professional disciplinary body who discloses, or uses, the information provided by the Ombudsman without the Ombudsman’s consent, unless the disclosure or use is related to taking disciplinary action. **[Part 5, Division 2, section 86]**

7.8 Disclosure may be made in certain circumstances, such as with the consent of the person to whose affairs the information relates **[Part 5, Division 2, section 87]**; if the person assisting a small business or family enterprise reasonably believes that disclosure is necessary to prevent a threat to life or health **[Part 5, Division 2, section 88]**; or if the protected information is already publicly available. **[Part 5, Division 2, section 89]**

7.9 A person assisting small business may disclose or use summaries of protected information or statistics derived from protected information that are not likely to identify a person. **[Part 5, Division 2, section 90]**

7.10 The Ombudsman may disclose protected information if the Ombudsman reasonably believes that it is necessary for the purposes of law enforcement or national security. A penalty of imprisonment for two years, or 120 penalty units, applies to persons, to whom information is disclosed, who then disclose, or use, the information provided by the Ombudsman without the Ombudsman’s consent, unless the disclosure or use related to law enforcement or national security purposes. **[Part 5, Division 2, section 91]**

Review of decisions

7.11 Section 92 of the Bill allows parties to appeal decisions by the Ombudsman to the Administrative Appeals Tribunal:

- that information is not to be treated as confidential information;
- that it is not in the public interest to delete information, a recommendation or an opinion from a report or an advice, before the report or advice is tabled or published; and
- to publicise that a party to a dispute has refused to engage in, or has withdrawn from, an ADR process.

[Part 5, Division 4, section 92]

Example 7.1: When a decision could go to the Administrative Appeals Tribunal

A business has refused to participate in an ADR process recommended by the Ombudsman, and the Ombudsman intends to publish this fact under subsection 74(1) of the Bill. The business has a court action underway, in relation to a different matter with another party. The business would not like this other party to know that it is in another dispute. The business may therefore choose to appeal the Ombudsman's decision to publish to the Administrative Appeals Tribunal.

Other matters

Privileges not waived

7.12 The privileges of protection against self-incrimination and legal professional privilege will be maintained under the Bill.

[Part 5, Division 4, section 93]

Provision of other Acts in relation to information and documents

7.13 Nothing in the Bill will affect the operation of any other law of the Commonwealth to the extent that the other law limits the use or disclosure of information or a document. *[Part 5, Division 4, section 94]*

Review of assistance function

7.14 To evaluate the Ombudsman's assistance function, section 95 requires a review of the assistance function, by 30 June 2017 (such a review is consistent with review provisions in other legislation, such as: section 151CN, *Competition and Consumer Act 2010*). After the initial review, further reviews of the assistance function must be conducted at intervals of not more than four years. Reviews must consider the:

- the kinds of assistance requested during the review period;
- whether the assistance given was convenient and effective for the small business and family enterprise operators who requested the assistance;
- whether amendment of the *Australian Small Business and Family Enterprise Act 2015* is needed to more conveniently and effectively assist small businesses and family enterprises.

7.15 Reviews may additionally consider other matters. After each review, a written report must be given to the Minister, who must lay it before each House of Parliament. [*Part 5, Division 4, section 95*]

Legislative instrument

7.16 The Minister may, by legislative instrument, make rules prescribing matters required or permitted by the Bill to be prescribed by the rules; or necessary or convenient to be prescribed for carrying out or giving effect to the Bill. [*Part 5, Division 4, section 96*]

Chapter 8

Consequential amendments

Outline of chapter

8.1 This chapter explains the consequential legislative amendments related to the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Bill).

8.2 References in this chapter to the ‘Consequential and Transitional Provisions Bill’ are references to the Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015. References to ‘the Bill’ are references to the main Australian Small Business and Family Enterprise Bill 2015.

8.3 References to ‘ASBFE Ombudsman’ are used in this chapter to distinguish the Australian Small Business and Family Enterprise Ombudsman (‘ASBFE Ombudsman’) from the existing Commonwealth Ombudsman, created under the *Ombudsman Act 1976*.

Summary of new law

8.4 Under the Bill (section 16) the ASBFE Ombudsman will avoid duplication and overlap with other agencies, including in relation to the ASBFE Ombudsman’s assistance function. The ASBFE Ombudsman therefore must work co-operatively with other agencies to deal with requests for assistance. To facilitate this, and allow the ASBFE Ombudsman to successfully perform the assistance function, consequential legislative amendments are necessary to enable the transfer of matters from the Commonwealth Ombudsman to the ASBFE Ombudsman.

Detailed explanation of new law

8.5 The Commonwealth Ombudsman is an independent statutory office which has a range of functions under the *Ombudsman Act 1976*. The Commonwealth Ombudsman can, for example, investigate the administrative actions of government officials and agencies, either on receipt of a complaint, or on the Commonwealth Ombudsman’s own initiative.

8.6 The ASBFE Ombudsman will also be created as a statutory office. Under the Bill, the ASBFE Ombudsman will have the power to, for example, deal with relevant actions involving an agency of the Commonwealth that affects, or may affect, a small business or family enterprise. There will thus be an overlap in jurisdiction between the Commonwealth Ombudsman and the ASBFE Ombudsman.

8.7 The Consequential and Transitional Provisions Bill will amend the *Ombudsman Act 1976*, to enable the Commonwealth Ombudsman to transfer complaints to the ASBFE Ombudsman. The Consequential and Transitional Provisions Bill will allow the Commonwealth Ombudsman to transfer a complaint to the ASBFE Ombudsman where:

- the complaint could have been made to the ASBFE Ombudsman, and
- the complaint could have been ‘more conveniently or effectively’ dealt with by the ASBFE Ombudsman.

[Schedule 1, item 1]

8.8 The ASBFE Ombudsman must also have the power to deal with the complaint under the Bill. The Commonwealth Ombudsman has the discretion whether or not to transfer a complaint. *[Schedule 1, item 1]*

8.9 In order to make a decision relating to a complaint, the Commonwealth Ombudsman must first consult with the ASBFE Ombudsman. This will ensure that both ombudsmen work co-operatively, and that complaints will be dealt with by the ombudsman that can ‘more conveniently or effectively’ deal with them. Once a decision has been made to transfer a complaint, the Commonwealth Ombudsman must transfer the complaint to the ASBFE Ombudsman ‘as soon as is reasonable practicable’. *[Schedule 1, item 1]*

8.10 To facilitate the provision of information, the Commonwealth Ombudsman must give the ASBFE Ombudsman any information or documents relating to the complaint, to enable the ASBFE Ombudsman to deal with the complaint. Written notice must also be given by the Commonwealth Ombudsman to the complainant, ‘as soon as is reasonably practicable’, regarding the transfer of the complaint to the ASBFE Ombudsman. *[Schedule 1, item 1]*

8.11 The wording of the amendment is based on similar provisions in the *Ombudsman Act 1976* (for example, section 6A). Whether an aspect of a request for assistance must be transferred will depend on the ‘conveniently or effectively’ test, which would apply to both ombudsmen and the parties involved in the complaint. *[Schedule 1, item 1]*

8.12 The proposed subsection 6E(4), that will be inserted into the *Ombudsman Act 1976*, will operate so that a complaint made to the Commonwealth Ombudsman and then transferred to the ASBFE Ombudsman, will be deemed to be a request for assistance under the *Australian Small Business and Family Enterprise Ombudsman Act 2015*, made on the date that the complaint was transferred to the ASBFE Ombudsman. *[Schedule 1, item 1]*

8.13 The proposed subsection 6E(5), that will be inserted into the *Ombudsman Act 1976*, deems a complaint which has been transferred under the *Ombudsman Act 1976*, to be a ‘formal request’ for assistance for the purposes of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (‘formal request’ is defined in subsection 66(5) of the Australian Small Business and Family Enterprise Ombudsman Bill 2015). Because the transferred complaint is defined as a ‘formal request’, section 23, and subsections 67(3), 68(2), 69(6), and 70(4) of the Bill, which relate to the ASBFE Ombudsman’s functions, apply to the transferred complaint. *[Schedule 1, item 1]*

8.14 These consequential amendments will commence immediately after the commencement of sections 3 to 96 of the Bill. *[Section 2]*

8.15 The consequential amendments take into account changes resulting from measures in the *Tax and Superannuation Laws Amendment (2014 Measures No. 70) Act 2015*, which transferred certain tax investigation and complaint handling functions from the Commonwealth Ombudsman to the Inspector-General of Taxation.

Chapter 9

Transitional provisions

Outline of chapter

9.1 This chapter explains the transitional arrangements that will apply under the Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015 (Consequential and Transitional Provisions Bill), specifically in relation to the disclosure, collection and use of information and documents held by the Australian Small Business Commissioner (Commissioner).

Summary of new law

9.2 The transitional arrangements allow relevant work of the Australian Small Business Commissioner (Commissioner), which is ongoing at the time of the creation of the Australian Small Business and Family Enterprise Ombudsman (Ombudsman), to be transferred to the Ombudsman for completion under the Ombudsman's advocacy and assistance functions.

Detailed explanation of new law

9.3 The Commissioner commenced operation on 2 January 2013. Since that time, documents and information have been obtained by the Commissioner in the course of performing its role and duties as Commissioner. Where work is ongoing, it is appropriate that relevant documents and information be passed to the Ombudsman — so that there is a continuation and progression of the work.

9.4 Schedule 2 of the Consequential and Transitional Provisions Bill allows for this by providing that the Commissioner may disclose to the Ombudsman relevant information and documents collected by the Commissioner for the purposes of the Ombudsman's advocacy and assistance functions. *[Schedule 2, item 1]*

9.5 The Ombudsman may receive and use the relevant information or documents only for the purposes of performing the Ombudsman's functions under the Australian Small Business and Family Enterprise Ombudsman Bill 2015 (Bill). There are also protections in the Bill in

relation to, for example, the use of confidential information (see definition of ‘confidential information’ in section 9 of the Bill), information which is subject to legal professional privilege (section 93 of the Bill), and protected information (see definition in section 80 of the Bill).

9.6 The transitional provisions in Schedule 2 of the Consequential and Transitional Provisions Bill commence on the day that the Consequential and Transitional Provisions Bill receives Royal Assent.

Chapter 10

Regulation impact statement

Outline of chapter

10.1 The following Regulation Impact Statement (RIS) including Attachments A and B was published by the Office of Best Practice Regulation and is located on their website at <http://ris.dpmc.gov.au/>.

Background

10.2 The establishment of the Ombudsman is an election commitment. The Regulation Impact Statement (RIS) considers the likely regulatory impact on businesses of different ways of implementing this initiative.

10.3 The RIS addresses seven questions outlined in the Australian Government Guide to Regulation.

The establishment of the Australian Small Business and Family Enterprise Ombudsman

10.4 The Coalition's Policy for Small Business¹ (August 2013) outlined a commitment to create a Small Business and Family Enterprise Ombudsman.

10.5 On 18 August 2014, following a period of public consultation, the Government announced its chosen model for the scope of the role — to be titled The Australian Small Business and Family Enterprise Ombudsman (the Ombudsman)². An early-assessment RIS was developed to support the Government's decision.

1 Available at www.nationals.org.au/Portals/0/2013/policy/Small%20Business.pdf, p 9.

2 The Hon Bruce Billson MP, media release *Small Business Assistance to be Strengthened*, issued 18 August 2014.

10.6 The Ombudsman will be a:

- Commonwealth-wide advocate for small businesses and family enterprises;
- Concierge for dispute resolution and provide its own dispute resolution service; and
- Contributor to the development of small business friendly Commonwealth laws and regulations.

10.7 The Ombudsman will also seamlessly link with the Government's single business service to help small businesses easily find out about other Government services and programmes, including general business advice.

10.8 Funding of \$8 million over four years was allocated in the 2014-15 Budget to transform the existing Office of the Australian Small Business Commissioner into a Small Business and Family Enterprise Ombudsman.

10.9 On 11 March 2015, Treasury released the exposure draft of the Australian Small Business and Family Enterprise Ombudsman Bill for public consultation. This final-assessment RIS has been developed to support the Government's decision to introduce the legislation into Parliament. Further detail on the consultation processes undertaken to develop this initiative is outlined under RIS Question 5: Consultation Plan.

RIS Question 1: What is the problem being addressed?

10.10 Small businesses make a substantial contribution to employment and production in Australia's economy. There are more than 2 million actively trading small businesses. As a group, they account for over 97 per cent of all businesses, employ around 4.6 million Australians (or about 43 per cent of private sector non-financial employment) and contribute more than 33 per cent of private sector production as measured by industry value added.

10.11 The Government has stated that building a strong and confident small business community is an important part of its commitment to delivering a productive and competitive economy.³

10.12 *The Coalition's Policy for Small Business*⁴ announced an election commitment in August 2013 to create a Small Business and Family Enterprise Ombudsman. The Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) will be a:

- Commonwealth-wide advocate for small businesses and family enterprises;
- Concierge for dispute resolution and provide its own service; and
- Contributor to the development of small business friendly Commonwealth laws and regulations.

10.13 The role of the Ombudsman will be complementary to, and avoid overlap with, the roles and responsibilities of other ombudsmen, the state small business commissioners and the services provided by state and territory governments where there are no small business commissioners.

The Australian Small Business Commissioner

10.14 The existing Australian Small Business Commissioner has been operating since 2 January 2013. The appointment is not supported by legislated powers. The Australian Small Business Commissioner reports to the Minister for Small Business and operates on a whole of Australian Government basis.

10.15 The Australian Small Business Commissioner provides advocacy and representation of small business interests and concerns to the Australian Government. The Australian Small Business Commissioner also provides information and assistance to small businesses, including referrals to existing dispute resolution services and practical help in discerning and dealing with core issues in disputes. The non-statutory basis of the Australian Small Business Commissioner means that the role has limited independence, credibility and effectiveness in facilitating small business access to justice through alternative dispute resolution services.

3 The Hon Bruce Billson MP, 2014, *The Small Business and Family Enterprise Ombudsman — Ministerial Statement*, www.treasury.gov.au/~media/Treasury/Policy%20Topics/Business/Small%20Business/Family%20Enterprise%20Ombudsman/Downloads/PDF/StatementAug2014.ashx, accessed 22 April 2015.

4 Available at www.nationals.org.au/Portals/0/2013/policy/Small%20Business.pdf, p 9.

State small business commissioners

10.16 The governments of New South Wales, Victoria, Western Australia and South Australia have established small business commissioners. The Australian Small Business Commissioner works collaboratively with the state small business commissioners to address current and emerging small business issues affecting multiple jurisdictions.

10.17 All four state small business commissioners are independent statutory officers. They all have a role in receiving and investigating complaints and providing dispute resolution services, although the nature and scope of their individual roles and powers vary. Some commissioners also oversee state based legislation relating to retail tenancy and fair trading.

States and territories with no small business commissioners

10.18 There are currently no small business commissioners in Queensland, Tasmania, the Australian Capital Territory and the Northern Territory. In these jurisdictions, the respective governments perform similar functions as the state small business commissioners through various agencies and departments. Small business assistance is delivered through a variety of means such as information portals, support lines and dispute resolution services through civil and small claims tribunals, fair trading offices, conflict resolution services and the court system. The Australian Small Business Commissioner also works collaboratively with these agencies to address small business issues.

Existing ombudsmen

10.19 There are a range of ombudsmen which assist individuals and businesses to resolve disputes with government agencies or businesses. General parliamentary ombudsmen, such as the Commonwealth Ombudsman, investigate complaints concerning the conduct and decision making of government agencies while specialised government ombudsmen operate in particular policy areas, for example the Fair Work Ombudsman. Industry ombudsmen oversee the conduct of firms in a particular industry, including telecommunications, electricity and gas, and financial services.

The Australian Small Business and Family Enterprise Ombudsman

10.20 The Ombudsman will extend and build on the activities of the Australian Small Business Commissioner to create a more purposeful, empowered and effective role. Statutory backing for the Ombudsman will help reinforce the Ombudsman's impartiality and equip it with the necessary tools to effectively receive and deal with small business concerns and disputes.

10.21 Specifically, the Ombudsman initiative addresses the following problems that limit the ongoing productivity and competitiveness of small businesses:

- Small businesses incur proportionally higher compliance costs than larger businesses.
- It can be confusing for small businesses to navigate appropriate access to justice avenues for addressing and resolving disputes.
- Small businesses can be deterred from seeking advice on a dispute because they perceive that the costs are too high.
- There is no formal framework for a small business to access alternative dispute resolution processes at the Commonwealth level.

10.22 Central to these problems are the unique characteristics of small businesses which influence the way they run their business and their capacity to deal with issues as they arise. The majority of all businesses in Australia, 60.7 per cent, do not employ staff. This means that most small business owners are also managers and are required to be in a position to take decisions across all aspects of their business. A further 27.2 per cent of all businesses only employ between one and four people.

10.23 The Australian Small Business and Family Enterprise Ombudsman Bill (Bill) will establish the Ombudsman position and specify the powers and functions of the role. The Bill outlines the Ombudsman's role under two key functions: advocacy and assistance.

Advocacy function

10.24 The aim of the advocacy function is to make it easier for small businesses to have their views heard by the Government and corporations. A key challenge for policy makers remains engaging with small businesses to gain their input on how regulations and policies may impact them. Time-poor business owners are unlikely to actively engage with

public service officials and there is no one representative industry group that reaches the entire small business community. This makes it difficult for government agencies to get practical insights and evidence on the impact of existing regulations and regulator activity on the small business community.

10.25 Under the advocacy function, the Ombudsman will:

- undertake research and inquiries into legislation, policies and practices affecting small businesses and family enterprises;
- report and give advice to the Minister for Small Business on those matters;
- contribute to inquiries by others into those matters;
- contribute to developing national strategies on those matters; or
- review proposals relating to those matters and advise the Minister for Small Business on them; and promote best practice in dealing with small businesses and family enterprises.

10.26 The Ombudsman's advocacy function will be supported by information gathering powers. The Ombudsman can also undertake research and inquiries into matter impacting small businesses, including the power to conduct, and take evidence in, hearings.

10.27 Governments across Australia have put in place various institutions and processes to ensure impacts on small business are considered and the views of small business are explicitly taken into account in the development of regulations. For example, some jurisdictions, including the Australian Government, have regulatory impact assessment processes for all new policy proposals which must assess the likely compliance cost on businesses. Some governments have established separate small business focussed units or advisory bodies that assist agencies to determine the impacts of policy proposals on small business (for example, the Western Australian Small Business Development Corporation). The Western Australian, New South Wales, Victorian and South Australian governments have established small business commissioner positions with a capacity to undertake advocacy work and contribute to the design of regulations affecting small businesses.⁵

5 Productivity Commission, 2013, *Regulator engagement with small business*, pp 87 — 88.

Assistance function

10.28 Under the assistance function, the Ombudsman will respond to requests for assistance by an operator of a small business or family enterprise. The aim is to facilitate a quick and cost-effective resolution that enables the commercial relationship to be maintained and get people back to the business of running their business.

10.29 A range of dispute resolution mechanisms exist for small businesses to resolve business-to-business disputes. In addition to state and territory legal avenues there are industry ombudsmen, state-based small business commissioners; sector specific codes of conduct, industry organisations and private dispute resolution services. There is also a range of low-cost options available to businesses to resolve disputes that do not involve expensive and prolonged litigation through the courts.

10.30 Alternative dispute resolution (ADR) mechanisms include a range of negotiation based methods that enable parties to prevent or manage their own disputes. These can include services such as: the provision of information and education to small businesses to help parties avoid disputes; early stage guided resolution; investigation; conciliation (making no determinations); assisted negotiation and mediation.

10.31 A small business may be aware that it has an issue, but may not have an appreciation of the nature and extent of the issue, or how to address it. Small businesses owners are time-poor and are unlikely to have the expertise themselves, or the skilled staff, to progress the issue, particularly as disputes tend to be ad-hoc and not part of 'business as usual' activities. As a result, small business operators may not be aware of the value, range and efficacy of dispute resolution services available. In some cases, they may perceive that the costs of resolving a dispute are too high and are deterred from seeking resolution of the issue.

10.32 Stakeholder feedback is that small businesses often do not seek support to help address a dispute until the business relationship has broken down, making it difficult for parties to begin or continue discussions on the matter. Dispute resolution services can assist to bridge this divide to help provide a pathway for parties to reach an agreement and move forward.

10.33 A discussion paper, *Resolution of small business disputes*, released by the former Department of Innovation, Industry, Science and Research (DIISR) noted that stakeholders considered that low dispute management skills and a lack of awareness of available dispute resolution

services meant that small businesses faced an increased risk of business failure.⁶ It suggested that improving the capacity of small businesses to address disputes may empower them to effectively deal with disputes at an early stage and avoid the escalation of disputes.

10.34 The independence of the Ombudsman will provide small businesses with comfort and confidence to seek advice on concerns and disputes. The Ombudsman's concierge function will support parties to understand their options to address their concerns. The Ombudsman will not duplicate the operations of other agencies. Depending on the nature of the request, the Ombudsman may transfer a request for assistance to another Commonwealth, state or territory agency or work co-operatively with other agencies to address the request.

10.35 If appropriate, the Ombudsman may recommend that parties to a dispute take part in an ADR process through its own service, on a user pays basis. The Ombudsman's own ADR service will address gaps in the current range of alternative dispute resolution services available to small businesses at the Commonwealth-level. The scope of this service is also limited by the Commonwealth's constitutional powers. It will only cover small business disputes that relate to Commonwealth Government agencies, international trade or interstate trade.

10.36 If an entity does not undertake a recommended alternative dispute resolution process, or withdraws from that process, the Ombudsman may publish that fact.

Gap in alternative dispute resolution services for small businesses

10.37 Currently, there is no formal framework for a small business to access ADR processes at the Commonwealth level. There is no safety net if a small business has an issue that falls outside the jurisdiction of existing complaints bodies. Some bodies are not equipped to provide meaningful referrals to another agency or offer an alternative dispute resolution process, leaving small businesses to spend more time in search of support. This leads to suboptimal outcomes where small business issues, complaints and requests for advice often go unaddressed.

10.38 For example, in 2014, the Australian Competition and Consumer Commission received 912 small business complaints which it did not consider raised Australian Consumer Law or competition issues.⁷ These

⁶ DIISR, 2011, *Resolution of small business disputes — options paper*, p 4.

⁷ Australian Competition and Consumer Commission, 2014, *Small business in focus (July-December 2014)*, p 2.

figures do not include small business complaints which the Australian Competition and Consumer Commission immediately assessed were not within their remit. This suggests that the total number of small business complaints to the Australian Competition and Consumer Commission were greater than those officially recorded.

10.39 There are a number of low cost dispute resolution alternatives available. However, the level of public understanding of these services, and their ability to reduce the level of unmet legal need through a low cost alternative, is low. The Productivity Commission has highlighted that ombudsmen and other low cost and informal dispute resolution services can provide an alternative to address this unmet demand, but that the services tend not to be visible to those who might require a low cost alternative to formal legal representation.⁸

RIS Question 2: Why is government action needed?

Small businesses face barriers to adequately address and resolve disputes

10.40 The objectives of Government intervention are to provide information and facilitate small business access to avenues for dispute resolution.

10.41 Disputes are damaging and costly for small businesses. A significant part of the problem for small businesses to access justice arrangements is the cost of finding information on how they can address their dispute.

10.42 Small business operators are often both unaware of the value or the potential benefits to themselves from seeking and accessing business advisory services to improve their capability to run their business (for example, business management skills). This lack of information about the quality and value of advice means that small businesses are less willing to pay to access private providers of advisory services.^[7]

10.43 Small businesses often have limited time, resources and financial capacity to search for and locate low-cost advice that is relevant to their business operations. The transaction costs of searching and

8 Productivity Commission, 2014, *Access to justice arrangements*, p 11. [7] Department of Innovation, Industry, Science and Research, 2011, *Small Business Advisory Services (SBAS) Review Report*, (not publically released).

locating information are high for small businesses due to the owner-operator management structure that is common in the sector. Small businesses often do not have the resources to maintain internal accountants and solicitors and usually have to seek advice from external sources. Small businesses find it difficult to judge the value and quality of advice, particularly legal advice, and may be deterred from approaching a private provider to discuss their issue.

10.44 Government is well placed to bridge the information gap for small businesses. The Government is seen as an independent broker without a commercial interest in providing advice so can act as an informed intermediary to help small business operators understand the various dispute resolution mechanisms that are available so they can deal with their disputes in a better informed manner.

Ability of the Government to address this issue

10.45 The governments of New South Wales, Victoria, South Australia and Western Australia have sought to address these information gaps by establishing small business commissioner positions with statutory powers relating to general small business disputes. These positions also have varying powers to address other matters such as retail tenancy (all four states) and farm debt mediation (Victoria only). The Productivity Commission found that the intervention of small business commissioners (or equivalent organisations) has been successful in reducing the cost, time and stress associated with resolving small business disputes. They can provide an important dispute resolution option in those jurisdictions that lack a significant civil tribunal.⁹

10.46 The Australian Government has demonstrated experience in facilitating businesses to assess and resolve issues and disputes. The Government currently facilitates dispute resolution services for businesses operating under the franchising, horticulture, produce and grocery, and petroleum (oilcode) industry codes of conduct. These services are delivered through a single contract with an external service provider.

Small businesses incur proportionally higher regulatory compliance costs than larger businesses

10.47 The objective of Government intervention is to minimise unnecessary compliance burdens on small business.

9 Productivity Commission, 2014, *Access to justice arrangements*, p 301.

10.48 Unnecessary compliance burdens create a barrier for small businesses productivity and growth. Small businesses are time and resource poor. Trying to find information on their compliance requirements and meeting these requirements divert their time and resources away from running their business.

10.49 As a regulator, the Australian Government has a clear role in ensuring that regulations are appropriate and are achieving the desired outcomes in an efficient way. Both the design and delivery of regulations are important considerations. In designing regulation, policy officers must ensure impacts on small business are considered and the views of small business taken into account.

Ability of the Government to address this issue

10.50 The small business community is diverse and fragmented which can make it difficult to engage. The Government utilises a number of tools and engagement strategies to reach small business to capture their views on proposed policies. Discussions with industry associations and representative groups are useful intermediaries to engage with but still have limited reach given that many small businesses are members an industry body.

10.51 The Productivity Commission draft report, *Regulator Engagement with Small Business*, identified that the way regulations are implemented is often as important to small business and to compliance outcomes as the content of the regulations themselves.¹⁰ For businesses, good engagement with a regulator is generally associated with an educative and facilitative regulatory approach, rather than a combative approach. The report highlighted that the time spent by businesses understanding regulations can be substantially reduced, and the likelihood of regulators' activities delivering good outcomes increased, when regulator communication is effective, and advice and guidance are accessible.

10.52 The Australian Small Business Commissioner's current advocacy role is constrained as it does not have legislated backing to undertake enquiries and reviews into issues negatively affecting the small business community. For example, if a number of businesses are raising similar concerns or complaints, the Australian Small Business Commissioner does not have the authority to obtain information (such as through stakeholder meetings and requests for data) to understand the drivers behind particular issues of concern. This limits the ability of the

10 Productivity Commission, 2013, *Regulator Engagement with Small Business*, pp 4-5.

Australian Small Business Commissioner to gather and analyse on-the-ground evidence of issues (such as burdensome regulation) and advise the Minister and relevant agencies.

RIS Question 3: Policy options under consideration

10.53 A detailed comparison of the functions and powers of policy options 1-3 are outlined at **Appendix B**.

Option 1: Status quo

10.54 The status quo would be to retain the existing Australian Small Business Commissioner position. The Australian Small Business Commissioner is a non-statutory position. Key functions of the Australian Small Business Commissioner are to:

- advocate and represent small business interests and concerns to the Australian Government;
- provide information and assistance to small businesses, including referral to dispute resolution services; and
- work with government to promote a consistent and coordinated approach to small business matters.

10.55 This option would also not meet the Government's election commitment to establish the Australian Small Business and Family Enterprise Ombudsman.

10.56 Stakeholder consultation supported the establishment of an Ombudsman role that is supported by legislated powers. Broad powers were generally recommended for the Ombudsman to investigate, mediate, enforce or refer a dispute to the appropriate agency. The majority of stakeholders were supportive of the Ombudsman as an advocate of small business interests and concerns, particularly to the Government.

Option 2: Establish a Small Business and Family Enterprise Ombudsman with stronger powers (preferred)

10.57 The establishment of the Ombudsman was a 2013 small business election commitment. The Government committed to extend and enhance the activities of the existing Australian Small Business Commissioner to create the Ombudsman. Funding of \$8 million over four years was allocated in the 2014-15 Budget to deliver this initiative.

10.58 Following ongoing consultation with the small business community, the Government has confirmed strong support for the Australian Small Business and Family Enterprise Ombudsman.

10.59 The Government has committed to introducing legislation that will provide for the Ombudsman to:

- be an impartial and independent position that can give small business the advice they need;
- help Government policy makers better understand the needs of small business; and
- be equipped with the tools to effectively receive and deal with small business concerns and disputes.

10.60 Consistent with the *Australian Government Guide to Regulation*, Government decisions about the scope and powers of the Ombudsman's functions were informed by a RIS. An early-assessment RIS was prepared to support the Government's decision on the scope of the Ombudsman's powers and functions. The Government announced its decision in August 2014. This final assessment RIS has been prepared for the Government's consideration of the Australian Small Business and Family Enterprise Ombudsman Bill (Bill) prior to introduction into Parliament.

10.61 Under the proposed legislation, the functions of the Ombudsman are to:

- advocate for small businesses and family enterprises in relation to relevant legislation, policies and practices (advocacy function);
- give assistance in relation to relevant actions if requested to do so (assistance function); and
- perform any other function conferred on the Ombudsman by any Act or legislative instrument.

10.62 The legislation provides flexibility for the Ombudsman to perform the functions of the role in any way that he or she sees fit, in the most convenient and effective way possible, as long as there is no duplication of functions performed by Commonwealth, state or territory agencies. The Ombudsman will also work co-operatively with Commonwealth, state and territory and comply with all other Commonwealth laws.

10.63 In considering the chosen model for the Ombudsman, the Government considered that dispute related queries are best handled by the Ombudsman and queries on general business advice, grants and support are best handled by the Department of Industry's single business service (www.business.gov.au, 13 28 46). Governance arrangements will be in place to ensure that the Ombudsman and the single business service work co-operatively to provide a user-friendly service to ensure small businesses receive the right assistance.

10.64 Detail on the powers and functions of the Ombudsman outlined in the Bill, including stakeholder views are outlined below.

Summary of powers in the Bill

Advocacy function

10.65 Under the advocacy function, the Ombudsman will have the power to conduct inquiries into the effect of relevant laws, policies and practices on small businesses, and make recommendations for how these might be improved.

10.66 Inquiries may be under the Ombudsman's initiative or at the direction of the Minister for Small Business. In conducting an inquiry, the Ombudsman can require a person to produce information or documents, with at least 10 business days' notice. Non-compliance with a request carries a financial penalty of 30 penalty units.

10.67 Under an inquiry undertaken at the direction of the Minister for Small Business, the Ombudsman can choose to hold formal hearings, with at least 10 business days' notice. The Ombudsman may summon a person to appear at a hearing to give evidence and produce documents. Failure to attend a hearing, refusal to answer questions or produce documents, or publication of evidence from a hearing against the Ombudsman's direction carries a financial penalty of 30 penalty units.

Assistance function

10.68 The Ombudsman can provide assistance to a small business or family enterprise where action by an entity with a constitutional connection affects or may affect a small business or family enterprise. Such entities include:

- Commonwealth and Territory agencies;

- Constitutional corporations¹¹;
- Any entity engaged in international trade or commerce;
- Any entity engaged in trade or commerce among the States, within a Territory, between Territories or between a State and a Territory;
- Any entity in relation to insurance, banking, telecommunications, copyright, patents, designs or trademarks; and
- Any entity that is operated by those living in or is located in a Territory.

10.69 On receiving a request for assistance, the Ombudsman may take the following actions:

- Refer the dispute to the appropriate agency;
- Recommend an alternative dispute resolution mechanism; or
- Decide not to provide assistance.

10.70 Under the assistance function, the Ombudsman may publicise a matter or a person's name where a party to a dispute has refused to engage in an alternative dispute resolution process recommended by the Ombudsman.

10.71 In deciding how to handle a request for assistance, the Ombudsman may make inquiries. As part of these inquiries, the Ombudsman can require a person to provide, with at least 10 business days' notice, specified information and documents. Failure to comply with the notice carries a penalty of 30 penalty units.

Specific provisions in the Bill in detail

Appointment and staff

10.72 The Ombudsman will be appointed by the Governor-General for a five-year term, and may be reappointed. The Ombudsman will be supported by an Office of the Ombudsman, including staff employed under the *Public Service Act 1999*, plus consultants as needed. These staff and consultants will work on inquiries and hearings, as well as supporting the Ombudsman in researching and providing advice to the Minister for Small Business.

11 Defined as a corporation to which s51(xx) of the Australian Constitution applies, or a body corporate that is incorporated in a territory

10.73 These powers are similar to other statutory positions. Stakeholders did not raise concerns with these arrangements.

Small business and family enterprise definitions

10.74 The Bill defines small businesses as those with fewer than 100 employees, or having revenue of \$5 million in the previous financial year.

10.75 The small business definition is closely linked to that of family enterprises. The Bill defines a family enterprise as small business operated as a family business. The 2013 Parliamentary Joint Committee on Corporations and Financial Services inquiry into *Family Business in Australia* found that most, but not all, family businesses were small businesses. It is also assumed that larger family businesses are better equipped to manage disputes than their smaller counterparts.

Stakeholder feedback

10.76 Stakeholders were generally supportive of the broad definition, but some raised concerns that the definition in the Bill is inconsistent with existing, widely adopted definitions and could result in confusion. Some stakeholders were concerned that some organisations have narrower definitions of a small business, and that they would reject referrals from the Ombudsman on that basis, leaving many businesses without an avenue for support.

10.77 The Government has chosen to use an inclusive definition of small business. Common definitions, such as those used by the Australian Bureau of Statistics and Australian Taxation Office were considered too restrictive and would limit the scope of regulation and legislation the Ombudsman could review. The definition of small businesses applies only to the services and activities of the Ombudsman. It does not apply to other state or territory Acts.

Advocacy

10.78 The Ombudsman will be an independent advocate that can represent small business interests at the national level. In practice, this will mean that the Ombudsman has the power to conduct inquiries into the effect of relevant laws, policies and practices on small businesses, and how these might be improved. Inquiries can be made on the basis of the Ombudsman's own motion or referral from the Minister.

10.79 When conducting an inquiry, the Ombudsman may hold formal, public hearings. The Ombudsman may require a person to appear at a hearing; and/or require a person to provide information and documentation. Non-compliance with a request carries a financial penalty of 30 penalty units.

10.80 The Ombudsman will regularly report to the Minister for Small Business on his/her activities and small business concerns, including a quarterly report to the Minister outlining the research conducted and inquiries made during the year. In addition, the Ombudsman may, at any time, provide the reports to the Minister outlining the findings and any related recommendations from his/her own-motion research and inquiries. The Minister may release these reports publicly. Before doing so, the Minister needs to take into account whether information in the report would negatively impact the interests of a business or individual. When the Minister has referred a matter to the Ombudsman for inquiry, the Ombudsman must produce a report on the inquiry, which the Minister must table in Parliament.

10.81 As a national advocate, it is expected that the Ombudsman will represent small business interests on relevant government boards and councils. The Ombudsman will also collaborate with state and territory small business commissioners and officials, and provide a single point of authority on systemic issues that warrant a coherent, coordinated national voice to government at all levels.

Stakeholder feedback

10.82 The majority of stakeholders were supportive of the Ombudsman as an advocate of small business interests and concerns, particularly to the Government. Key concerns raised related to privacy; the scope of the inquiry powers; and the potential conflict between the Ombudsman's advocacy and dispute resolution role.

10.83 Stakeholders considered that the Ombudsman should be able to receive concerns in confidence to encourage parties to openly bring forward issues for advocacy. Some raised concerns that the Ombudsman's information gathering powers were broad and information collected under them would still be subject to Freedom of Information provisions, which could see the release of commercial in confidence material. Stakeholders emphasised the importance of keeping commercial in confidence information out of the public domain. To address these concerns, the Bill includes provisions to protect information that is commercial in confidence or subject to legal professional privilege. For example, the Bill provides for the Minister to direct the Ombudsman to notify relevant stakeholders about the intention to publish a report and give them sufficient time (up to 30 days) to put forward any concerns or objections. The Bill also requires confidential information to be deleted from the report prior to publication. This will ensure that private or commercially sensitive information is not cast into the public domain where it may cause undue embarrassment or disclose trade secrets. Information obtained by the Ombudsman will remain subject to Freedom of Information provisions.

10.84 Some stakeholders were concerned at the extent of the Ombudsman's powers to conduct inquiries and wanted to ensure that they did not undertake 'fishing expeditions' into particular industries, as opposed to acting on genuine concerns raised by small businesses. Broad powers under the advocacy function are important to ensure that the Ombudsman is equipped to advocate on behalf of small business and meet the Government's election commitment. The legislative provisions are appropriate given the role needs to be designed for any individual to occupy it. However, in practice, the discretion and judgement of the appointee will determine how these powers are used.

10.85 Some stakeholders were concerned about the level of oversight and power granted to the Minister to prevent publication of information and to direct the Ombudsman to conduct an inquiry, arguing that it calls into question the Ombudsman's independence and allows the Ombudsman to be politicised. The reporting structure proposed for the Ombudsman is consistent with the arrangements for state-based commissioners, who also report to their respective State Ministers.

10.86 There was some stakeholder concern on the need for the Ombudsman to be independent in its dispute resolution which may conflict with the advocacy function. Based on these concerns and advice from the Attorney-General's Department, the advocacy role will be functionally separate to the broader activities of the Ombudsman to dispel any perceptions that the Ombudsman unduly favours one set of interests in the conduct of its dispute resolution activities.

Concierge for dispute resolution

10.87 Unresolved disputes and conflicts can significantly impact the performance of a small business. Given the large number of small businesses that have experienced a dispute, but generally lack the resources to resolve it, the Ombudsman will act as a 'concierge' for dispute resolution and provide his/her own (limited) dispute resolution service, assisting small businesses on request. The objective of the Ombudsman's dispute resolution service is to facilitate both parties to reach an agreed position on the issue at hand and allow small businesses to shift their focus back to running their business as quickly as possible.

10.88 All small business complaints and enquiries received by the Ombudsman will go through an initial assistance and referral phase. On receiving a request for assistance in a dispute, the Ombudsman may take the following actions:

- decide not to provide assistance;
- refer the dispute to the appropriate agency; or
- recommend an alternative dispute resolution process.

Not providing assistance

10.89 The Ombudsman may decide not to provide assistance on a matter brought forward by a small business. Requests can be declined on the basis of, for example, the request being made more than 12 months after the applicant became aware of the action, or the request not being made in good faith. Requests can also be declined if the person does not have a sufficient interest in the issue; that is, they are too far removed from the issue.

10.90 Some stakeholders raised concerns that the Ombudsman would have the power to reopen decisions that had been taken by other bodies and as such would allow dissatisfied parties to ‘forum shop’ when they did not like an outcome. The Bill is designed to prevent forum shopping, as the Ombudsman cannot act outside his/her jurisdiction or deal with a request that has already had action taken by a court or Government Agency.

Referrals

10.91 A key role of the Ombudsman will be to help small businesses understand what mechanisms are available to them to address a dispute.

10.92 There are a number of existing mechanisms in place for small businesses to address complaints and disputes. For example, the state-based small business commissioners provide a range of alternative dispute resolution services. In the states and territories without small business commissioners the respective governments perform similar functions through various agencies and departments. Small business assistance is delivered through a variety of means such as information portals, support lines and dispute resolution services through civil and small claims tribunals, fair trading offices, conflict resolution services and the court system. There is also a range of government and industry ombudsman, as well as private mediation providers.

10.93 When a small business complaint or dispute comes through, the Ombudsman’s default position will be to determine whether or not the issue would be more appropriately addressed under other access to justice arrangements, such as those listed above. The Ombudsman may also provide immediate information on what options a small business has to resolve the dispute or actions it should pursue first through existing complaints its frameworks. For example, a small business in dispute with a Commonwealth Government agency will be encouraged to pursue their complaint through the agency’s internal complaints process in the first instance before escalating the issue through the Ombudsman.

10.94 Businesses that use ADR mechanisms referred by the Ombudsman would need to pay for these services.

Stakeholder feedback

10.95 Stakeholders emphasised that the Ombudsman's dispute resolution activities should not duplicate existing services. The guiding policy principle under the Ombudsman is to avoid duplicating functions of Commonwealth, state or territory agencies. The Bill includes key clauses stating that the Ombudsman must refer requests to an appropriate agency or organisation for further action when that agency is able to deal with the request more conveniently or effectively or that agency has the legal authority to deal with the request. The Ombudsman may also work co-operatively with other agencies to provide assistance. Examples of these agencies or organisations could include (but are not limited to) the Australian Competition and Consumer Commission, the Commonwealth Ombudsman, or state-based small business commissioners, as appropriate. In order to ensure a smooth process for the person making the request, the Ombudsman must consult with that agency before transferring the request, and must share all information and documents with them.

10.96 Several stakeholders who already offer services to small businesses thought that the Ombudsman is given too much discretion when determining referrals, and that the service provision agency should be able to decide whether a matter falls in their jurisdiction or not (or at least give consent whether to accept a matter or not). Some agencies suggested specific receiving agencies be listed in the Bill. Additional governance arrangements, such as memoranda of understanding (MOUs) or an exchange of letters with other agencies will underpin the referral process and identify the types of matters which would be dealt by the respective agencies. This approach is considered to be more appropriate than listing specific agencies as the names and jurisdictions of agencies can change over time and would not provide flexibility as new agencies are formed in the future.

10.97 These requirements are intended to see disputes resolved in the most appropriate manner by the most appropriate body, whilst causing as little administrative inconvenience to the small business in question as possible.

10.98 It is expected that a large proportion of inquires received by the Ombudsman will be referred to existing agencies given the limitations on the Ombudsman's own ADR service (discussed below). In most cases, it is expected that providing timely information at this early stage helps to resolve the issue and eliminate the necessity to escalate into a formal ADR process. Initial advice and referrals activities will be undertaken at no financial cost to small businesses or family enterprises.

Ombudsman's own ADR service

10.99 If appropriate, the Ombudsman may recommend that parties to a dispute take part in an ADR process through its own service, on a user pays basis. ADR processes can include conferencing, mediation, neutral evaluation, case appraisal, conciliation, prescribed procedures/ services.

10.100 The Ombudsman's own dispute resolution service will address gaps in the current range of alternative dispute resolution services available to small businesses at the Commonwealth-level. The scope of this service is also limited by the Commonwealth's constitutional powers. It will only cover small business disputes that relate to Commonwealth Government agencies, international trade or interstate trade.

10.101 Should the parties choose not to undertake, or to withdraw from, the recommended ADR process, the Ombudsman can make this knowledge public. This provision provides strong incentives for parties to consider carefully their approach to the Ombudsman, but also to take seriously his/her recommendations. The Ombudsman's dispute resolution function is also supported by powers to require a person to provide information or documentation. A financial penalty (30 penalty units) may apply for non-compliance.

Stakeholder feedback

10.102 Stakeholder views on the extent of the Ombudsman's ADR role were mixed. Whilst many stakeholders supported the 'name and shame' provisions, some were concerned that it was too heavy-handed and will be difficult for the Ombudsman's office to track. On the other hand, some stakeholders called for stronger, determinative powers. Feedback from dispute resolution providers emphasised that mediation is more likely to be successful if both parties are willing to engage and participate in the process. In finalising the Bill, the 'name and shame' powers were considered to provide the right balance to encourage parties to participate in the process, but not so punitive that small businesses would be discouraged to approach the Ombudsman.

10.103 To maintain impartiality, the Ombudsman cannot undertake ADR personally, and ADR mediators must be chosen by parties to the dispute. This ensures that the Ombudsman's advice remains impartial, but also that the Ombudsman's assistance work does not bias his/her advocacy work. In practice, this means that the Ombudsman will make use of a panel of specialist ADR providers for parties to choose from to progress their dispute. Some stakeholders were supportive of an outsourced arrangement; the state-based commissioners generally manage a panel of mediators.

10.104 The 2014 policy discussion paper for the Ombudsman sought stakeholder views on whether the Ombudsman's ADR service should extend to the mandatory industry codes of conduct established under the *Competition and Consumer Act 2010*. Given the need for the Ombudsman's advocacy and dispute resolution roles to be separate, it is not appropriate for the Ombudsman to be appointed as the mediation adviser for these codes.

Title

10.105 Several stakeholders expressed a preference to retain the existing title of 'Commissioner' due to its brand recognition and consistency with state-based commissioners. The Government considers that the 'Ombudsman' title reflects the expanded functions and powers of the position and emphasises the independence of the role. Recognising the need for an Ombudsman to be impartial, the Office of the Ombudsman will be structured so that there is a clear separation between its dispute resolution and advocacy functions. This will allow the Ombudsman to speak to the Government about issues facing smaller businesses, but also provide an independent dispute resolution service that helps businesses get the help they need.

Appeals

10.106 Stakeholders raised the question of how the Ombudsman's decisions can be appealed. The Bill states that decisions taken by the Ombudsman can be appealed by application to the Administrative Appeals Tribunal.

Option 3: Establish the Australian Small Business and Family Enterprise Ombudsman with limited powers

10.107 This option involves establishing the Australian Small Business and Family Enterprise Ombudsman under legislation with the same four functions as listed under option 2. Under this option however the Ombudsman would have more limited powers than that proposed under option 2.

10.108 Under option 3, the key powers that have a regulatory impact on small business under option 2 would be removed. Specifically, the:

- ability to require information from parties in dispute (and associated financial penalties).
- ability to require parties to attend hearings (and associated financial penalties).

- ability to publicise the names or parties that do not participate, or withdraw from, a recommended ADR process.

10.109 These powers support the dispute resolution and advocacy functions of the Ombudsman. This will mean that the Ombudsman's dispute resolution services are entirely voluntary.

10.110 Under option 3, the position will still be provided with a legislated framework in providing advocacy and dispute resolution services and to undertake enquiries into issues affecting small businesses.

10.111 This option would provide for a statutory, independent Ombudsman to be established. Legislation would clearly outline the key functions of the role and also allow the Ombudsman to provide its own ADR service, addressing the gaps in the current range of alternative dispute resolution services available to small businesses. The Ombudsman's dispute resolution roles will also address information gaps small businesses face in understanding what justice mechanisms are available to them to address a complaint or dispute.

10.112 This option would partially address stakeholder support for the establishment of a statutory Ombudsman to advocate small business concerns and provide dispute resolution support. This option would meet the Government's election commitment to establish the role with 'real teeth'.

10.113 This lighter touch approach would not achieve the same outcomes for small businesses as the model proposed under option 2. The Ombudsman's advocacy role would be dampened as he or she would not be able to incentivise parties to co-operate on research and inquiries projects, thus limiting his or her ability to fully identify and analyse issues. This will make it difficult for the Ombudsman to provide meaningful recommendations to Government on how to improve regulations, laws, processes and practices that are adversely impacting small businesses.

RIS Question 4: What is the net benefit of each option?

Option 1: Status quo

10.114 This option is not preferred. It will not deliver on the Government's commitment to establish the Ombudsman.

10.115 A wide range of Commonwealth, state and territory government agencies provide avenues for access to justice which can be complex for

small business to understand and navigate. Currently, there is no formal framework for access to alternative dispute resolution processes at the Commonwealth level. There is no safety net if issues fall outside the regulatory reach of agencies, which are not equipped to provide meaningful referrals. This leads to suboptimal outcomes as small business issues, complaints and requests for advice may go unaddressed.

10.116 The Australian Small Business Commissioner was established without legislation or a comprehensive operating framework, which has precluded it from having a role in assisting small businesses to access justice arrangements, beyond referring businesses to an existing, appropriate service. If a business raises a matter with the Office of the Australian Small Business Commissioner, the Office provides a triage service by undertaking preliminary discussions to determine the most appropriate course of action, and where appropriate, refer the business to other existing dispute resolution services or other complaint bodies. The Australian Small Business Commissioner does not have authority to provide assistance beyond this triage role, thus limiting its ability to facilitate appropriate access to justice for small business.

10.117 The Australian Small Business Commissioner's current advocacy role is constrained in its ability to undertake enquiries and research into issues negatively affecting the small business community. For example, if a number of businesses are raising similar concerns or complaints, the Australian Small Business Commissioner does not have the authority to obtain information to understand the drivers behind particular issues of concern. This limits the ability of the Australian Small Business Commissioner to gather and analyse on-the-ground evidence of issues (such as burdensome regulation) and advise the Minister and relevant Government agencies where appropriate.

10.118 As the Australian Small Business Commissioner is not supported by powers, it is not considered to impose a regulatory cost on businesses. The costs to Government of this role relate to the operating costs for the Office of the Australian Small Business Commissioner. Funding of \$8.3 million over four years was provided in the 2012-13 Budget to establish the Office of the Australian Small Business Commissioner.

Option 2: Establish a Small Business and Family Enterprise Ombudsman with real power (preferred)

10.119 This option is preferred as it provides the greatest net benefit.

10.120 A strong and confident small business community is central to the Government's commitment to delivering a productive and competitive economy. The Ombudsman will help contribute to this commitment by:

- helping small businesses resolve disputes early, in turn improving business productivity, preserving business relationships and avoiding expensive litigation;
- improving engagement between the Government and the small business sector to ensure that small business interests are at the centre of policy and programme design and business interaction; and
- streamlining access to Government assistance and support to reduce complexity and save time.

10.121 Granting of statutory powers will allow the Ombudsman to more effectively contribute to the Government's understanding of small business interests and the impact that Government actions have on small businesses. This will support the Government's broader deregulation agenda, and help achieve benefits for small businesses by gathering and providing on-the-ground evidence and practical solutions to policy makers and regulators.

10.122 The costs and benefits of each of the Ombudsman's key functions have been quantified using the framework outlined in *The Australian Government Guide to Regulation*. Regulatory costs to business, community organisations and/or individuals are quantified using the Regulatory Burden Measurement (RBM) framework. This framework includes consideration of administrative costs, substantive compliance costs and delay costs. Broader economic costs have also been quantified and detailed below.

Quantitative costs: advocacy

10.123 The Bill provides for Ombudsman to conduct research and inquiries into the effect of relevant laws, policies and practices on small businesses, and how these might be improved. For example, the Ombudsman may help monitor and report on the efficacy of industry codes of conduct and fair trading provisions, the behaviour of regulators in undertaking compliance activities, and responsiveness and effectiveness of agency complaints mechanisms.

10.124 The Ombudsman can undertake research and inquiries through informal stakeholder meetings and interview or data analysis. The Bill also provides for the Ombudsman to conduct formal hearings and provides information gathering powers.

10.125 It is expected that these powers would be seldom exercised and most parties would participate voluntarily. In general, business compliance costs relating to activities that small businesses would already be engaging in, or engaging in on a voluntary basis, such as participating in voluntary hearings or inquiries, are not included in the RBM. However there is an economic cost to those organisations assisting the Ombudsman with such activities. Costs could include time taken to prepare for and participate in hearings or informal stakeholder consultations and interviews. These economic costs are quantified below.

10.126 The Ombudsman's advocacy powers are similar to the Productivity Commission. The Productivity Commission incurs publishes the costs of undertaking inquiries, including holding public hearings, in its annual reports. In consultations, the Productivity Commission noted for a large inquiry it incurs costs of around \$2 million to run. For example, its inquiry into Childcare and Early Childhood Learning (11 month inquiry, final report to Government in October 2014) cost \$2.3 million.

10.127 The resourcing of the Ombudsman (\$2 million per annum) will necessarily limit the scope and scale of its inquiries, particularly through holding hearings. It is therefore assumed the Ombudsman's power to hold hearings will not be exercised for all advocacy projects.

10.128 In estimating the costs for the Ombudsman's advocacy function, it is assumed that the Ombudsman's resourcing would support:

- 1 significant research and inquiry project involving public hearings every four years.
- 1.5 smaller scale research and inquiry projects each year involving desktop research, stakeholder interviews, data analysis and call for submissions (or 6 over 4 years).

Public hearing based projects

10.129 The costs of these projects is modelled off the Productivity Commission's report *Australia's Automotive Manufacturing Industry* which was released in August 2014. The cost to the Productivity Commission to hold this inquiry was \$1.1 million.

10.130 The inquiry was held over five months, involved visits to 46 parties and hearings held over five days. It is assumed that parties would attend the hearing in the nearest capital city. The Productivity Commission estimates that up to 15 parties appear each day with each party appearing for 45 minutes on average.

10.131 It is assumed that each party would involve four staff in this process — A general manager, senior manager and a junior professional staff member. The hourly cost of this staff time is outlined in the Table 10.1 below.

Table 10.1: Estimated hourly staff costs

<i>Position</i>	<i>Average weekly pay</i>	<i>Hourly rate (assuming 40 hour week)</i>
General-Manager (GM)	2573.6	64.3
Senior Manager (SM)	2113.8	52.8
Professional (P)	1548.2	38.7

Source: ABS, 2015, Employee Earnings and Hours, Australia, May 2014, cat no. 6306.0.

10.132 The cost per party of participating in a hearing process is outlined in **Table 10.2** and **10.3** below. It assumes a total of 75 parties (5 hearings x 15 parties per day) attending hearings and an additional 46 parties involved in separate meetings (face to face at their premises or via telephone).

10.133 The subject matter of enquiries will be on systemic issues facing small businesses, such as the impacts of particular laws and regulations. It is not expected that the nature of these hearings will require legal advice, however some businesses may choose to seek such advice if compelled to provide documentation or evidence at a hearing. The costs assume that businesses will seek legal advice at a cost of \$1500¹². As evidence and transcripts at hearings are made public, it is assumed that a party will invest greater preparation and follow-up time in participating in hearings compared to one-on-one consultations.

12 Consultations indicate that legal cost quotes are often provided on a project/ task basis rather than an hourly rate. \$1500 was considered an average cost.

Table 10.2: Estimated cost of participating in hearings

<i>No. of parties</i>	<i>Hours at hearing per party</i>	<i>No. staff per party</i>	<i>Travel time (hours)</i>	<i>Preparation and follow-ups (G)</i>	<i>Preparation and follow-ups (S)</i>	<i>Preparation and follow-ups (P)</i>	<i>Legal costs (\$)</i>	<i>Cost per party (\$)</i>	<i>Total costs (\$)</i>
75	0.75	3	1.5	8	15	25	1,5400	4,126	309,433

Table 10.3: Estimated cost of participating in consultations

<i>No. of parties</i>	<i>Hours in interview</i>	<i>Preparation and follow-ups (G)</i>	<i>Preparation and follow-ups (S)</i>	<i>Preparation and follow-ups (P)</i>	<i>Cost per party (\$)</i>	<i>Total costs (\$)</i>
46	1.0	4	8	15	1,417	65,163

Table 10.4: Estimated time required per in-depth inquiry of the Ombudsman

<i>Parties</i>	<i>No. of parties</i>	<i>Preparation and follow-ups (GM)</i>	<i>Preparation and follow-ups (SM)</i>	<i>Preparation and follow-ups (P)</i>	<i>No. of phone calls</i>	<i>Hours per phone call</i>	<i>No. of meetings</i>	<i>Hours per meeting</i>	<i>Cost per party (\$)</i>	<i>Total costs (\$)</i>
Primary	3	25	30	35	5	2	5	3	8,446	25,337
Secondary	5	15	20	25	3	2	3	3	5,328	26,640
Other	8	3	5	8	0	0	1	3	1,235	9,876
Total										61,854

10.134 The cost to business of participating in a hearing-based inquiry is \$374,596. If one hearing-based inquiry is conducted every four years, this would average \$93,649 per year.

Interview/submission based projects

10.135 The Australian Small Business Commissioner's report *ASIO building: the costs of poor contracting practices* has been used as a model for these costs.

10.136 For the purposes of estimating the economic cost, parties involved in the Ombudsman's inquiries have been categorised as primary, secondary or other stakeholders. It is assumed the Office of the Ombudsman could conduct both an interactive engagement with these stakeholders through meetings and phone conferences. It may also openly call for submissions from organisations on a voluntary basis.

10.137 On average, each party is assumed to involve three staff (general manager, senior manager, junior professional) in the process. The costs of these staff the same as those outlined in **Table 10.1**.

10.138 The average time spent assisting with the inquiry is outlined in the **Table 10.3**. It assumed that all four staff will participate in meetings, phone interviews and undertake preparatory work.

10.139 Undertaking taking 1.5 Interview/ submission based projects per year, the estimated cost to business is estimated to be \$92,780.

Quantitative costs: dispute resolution

10.140 The Ombudsman's dispute resolution function will be supported by legislated powers to refer matters to appropriate, existing agencies; require parties to provide information in relation to a dispute; refer matters to its own ADR service; and publicise name of parties not willing to participate in a recommended ADR process.

10.141 It is not expected that the Ombudsman would regularly exercise its powers to incentivise parties to participate in mediation. However parties participating in the Ombudsman's own ADR service will bear economic costs (in staffing resources and out of pocket expenses).

10.142 The costs borne by parties depend on how the issue is dealt with by the Ombudsman. All small business complaints and enquiries received by the Ombudsman will go through an initial assistance and referral phase. On receiving a request for assistance in a dispute, the Ombudsman may decide not to provide assistance; refer the dispute to the appropriate agency; or recommend an alternative dispute resolution process.

10.143 **Appendix C** depicts the process of how a case is managed and escalated through the office of the Ombudsman. It also includes estimates on the number of cases that are expected to be dealt with by the Ombudsman each year. Assumptions underlying these figures are detailed below.

Incoming enquiries

10.144 As an estimate for demand for dispute resolution, Treasury has sought figures from existing Commonwealth and national complaints bodies to identify the number of complaints each agency received in the last financial year from small businesses that fell outside their jurisdiction. The Ombudsman is expected to fill this gap so small businesses can have their complaints heard. Treasury has used these figures as a proxy for the expected volume of small business disputes that may be brought forward to the Ombudsman each year.

10.145 Treasury assumes that the level of disputation will not increase above the status quo as the estimated demand is based on the existing number of enquiries that come through to, but not within the jurisdiction of, existing complaints frameworks.

Initial advice and referrals

10.146 Requests for assistance from small businesses are expected to initially be triaged through an information line service, similar to the Australian Small Business Commissioner's Information Line. This initial inquiry stage will involve talking through the issues with the business and suggesting informal and formal actions they could take to progress to the dispute.

10.147 Not all incoming enquiries will fall within the Ombudsman's jurisdiction and therefore be escalated to its own ADR service. Further, the Bill requires the Ombudsman to transfer a request for assistance to another Commonwealth, state or territory agency, if that agency could deal with the request and it would be more effective and convenient for that agency to do so.

10.148 It is difficult to estimate the number of matters that will fall within the jurisdiction of the Ombudsman's own ADR service (small business disputes relating to Commonwealth agencies, interstate trade and international trade) and where an ADR process would be appropriate. The complaints data obtained from Commonwealth complaints agencies does not capture sufficient information to identify whether matters fall within these categories. Given the narrow range of disputes that can be handled by the Ombudsman's own ADR service, it is assumed 75 per cent of inquiries would be either be dealt with through initial advice or referred to

other existing services. The remaining 25 per cent would be within scope of the Ombudsman's own ADR service and for which an ADR service is considered an appropriate course of action.

10.149 Given that small business and family enterprises can approach the Ombudsman voluntarily (it is not anticipated that there will be any application forms to receive information and advice), there is no regulatory cost for businesses at this stage.

Own ADR service

10.150 If a dispute falls under the Ombudsman's jurisdiction, the Ombudsman may recommend parties participate in an ADR process. ADR (as defined in the Bill) can include early stage guided resolution; investigation; conciliation (making no determinations); assisted negotiation and mediation. To ensure impartiality, the Ombudsman's own ADR service will be delivered through an outsourced arrangement.

10.151 The type of ADR process will impact the cost to businesses of participating. For example, state-based small business commissioners generally offer a pre-mediation service at no charge. This lighter touch approach can be conducive to resolving a dispute without the necessity to progress into formal mediation processes. It can involve case manager's separately approaching parties to a dispute to gather and clarify factual information on the matter.

Light touch

10.152 It is assumed that the proportion of cases that would go through a lighter touch ADR service reflects the number of inquiries that are received by the state-based small business commissioners that go through their pre-mediation service. On average, this is estimated to be 13 per cent.

10.153 Advice from case managers within the offices of the state-based small business commissioners and the Australian Small Business Commissioner is that the most common process the Ombudsman may take to approach the respondent is via a letter. The Ombudsman would bring the issue to the respondent's attention and seek their views and feedback. This process may continue through a number of exchanges.

10.154 The cost to business in this phase is the time taken by a respondent to reply to the Ombudsman. For each case, costs are calculated assuming:

- The responding party must reply to an average of two letters from the Ombudsman.

- A general manager will spend 1.5 hours considering a response to each letter.
- A senior manager in the organisation will spend 3 hours considering a response to each letter.
- A junior team member (professional) will spend 6 hours considering a response to each letter.

10.155 Feedback from consultations is that larger businesses may allocate greater staffing hours than a small business. The staff costs above are assumed to be an average per party as it is difficult to estimate the business size of parties to disputes that will come through. Further, the complexity of a dispute will also influence the time a business takes to engage in this process.

10.156 Costs have been applied to both parties to the dispute (applicant and the respondent). While the respondent is being compelled to respond, the applicant will also need to provide information and respond to letters in order to progress the dispute.

Table 10.5: Cost per party of light touch ADR process

<i>Staff— position/role</i>	<i>Hours per letter</i>	<i>Numbers of letters</i>	<i>Total staff hours</i>	<i>Total staff cost (\$)</i>
General Manager	1.5	2	3	193
Senior Manager	3	2	6	317
Professional	6	2	12	464
TOTAL				975

10.157 The total cost of a lighter touch ADR process for two parties is assumed to be \$1949 (\$975 each).

Mediation

10.158 It is assumed that the remaining proportion of cases (87 per cent) will go through a more involved ADR process such as mediation.

10.159 Costs borne by parties to a dispute includes the time to prepare for and participate in a mediation session. There may also be out-of-pocket expenses including travel, room hire and the cost of the mediator. These costs will be shared evenly by both parties. Consultation with dispute resolution providers indicate that businesses may also seek external legal advice and may also have legal representation during the mediation session. Key cost assumptions are listed below.

10.160 Out of pocket expenses per party:

- Average travel costs for attending mediation: \$178 (average travel cost to attend a VCAT hearing).¹³ Stakeholders highlighted that mediation sessions are generally held in person and at a location convenient to both parties. It is expected that the Ombudsman will have access to providers located across metropolitan and regional areas.
- Room hire: \$450 (split between both parties).¹⁴
- Cost of mediator: \$275 per hour (full cost to be shared between both parties).¹⁵
- Average length of mediation session is 6 hours (based on stakeholder consultations). On average the mediator will put 1 hour of preparation time per hour of mediation.
- Legal advice: \$2700 — assuming all parties seek legal advice prior to mediation (\$1500 based on stakeholder consultations) and 50 per cent of stakeholders have a lawyer present during mediation (0.5 x 6 hours x \$400/hours)¹⁶.

10.161 **Tables 10.6 and 10.7** outline the total out of pocket expenses and staff costs per party to participate in a mediation session. Stakeholder feedback is that the number of representatives that attend mediation varies greatly from 1 representative per party to up to 10 (not common). Feedback is that on average 3 representatives may attend, including a senior manager as parties are expected to be in a position to make a decision on any agreements coming out of the mediation.

13 Victorian Small Business Commissioner, 2013, *The costs of participating in business-to-business disputes at the Victorian Civil and Administration Tribunal (VCAT)*.

14 Based on full day room hire for mediation room with one breakout room, <https://www.disputescentre.com.au/Facilities/Room-Rates>, accessed 17 April 2015.

15 Based on hourly cost of mediation under the Office of the Franchising Mediation Adviser.

16 Consultations indicated that not all parties will have a lawyer present or have sought legal advice before participating in mediation. Consultations indicate average legal cost per hour would be approximately \$400.

Table 10.6: Mediation out-of-pocket expenses per party

<i>No. of mediator (per hour)</i>	<i>Hours in mediation</i>	<i>Mediator preparation time (hours)</i>	<i>Room hire (\$)</i>	<i>Shared costs per party(\$)</i>	<i>Travel (\$)</i>	<i>Legal advice (\$)</i>	<i>Total expenses per party(\$)</i>
275	6	6	450	2,100	178	2,700	4,978

Table 10.7: Mediation staff costs per party

<i>Staff— position/role</i>	<i>Hours in mediation</i>	<i>Preparation (hours)</i>	<i>Total staff hours</i>	<i>Total staff cost (\$)</i>
General Manager	6	6	12	772
Senior Manager	6	20	26	1,374
Professional	6	30	36	1,393
TOTAL				3,539

Qualitative costs

10.162 Some stakeholders highlighted concerns that small businesses may be confused about the role and remit of the Ombudsman. For example, a small business may be unsure of whether they should approach the Ombudsman, a state-based small business commissioner, or an industry ombudsman to seek advice on a dispute. Industry bodies echoed that that it will be equally important that they understand the extent of the Ombudsman’s services. It is difficult to anticipate whether such confusion will be a significant concern. This risk will be mitigated through a targeted communications and engagement strategy, particularly in the first 12 months of operation, to educate the community (small businesses, industry organisations and other ADR providers) about the Ombudsman’s role and powers.

10.163 It is not anticipated that businesses will bear significant costs from misunderstanding the role of the Ombudsman. The aim of the Ombudsman’s to facilitate a quick and cost-effective resolution. As noted earlier, often businesses will not pursue a dispute as they are not aware of what avenues are available to them to resolve the matter. If a small business contacts the Ombudsman with a request for assistance, the Ombudsman will help small businesses understand their options to address the matter and facilitate a seamless referral to the most appropriate support agency. Such referral processes will be facilitated through governance arrangements, such as MoUs, with existing Commonwealth, state and territory bodies.

10.164 Small business disputes with Commonwealth Government agencies can be directed through the Ombudsman's own ADR service. This could result in more small businesses pursuing disputes with their dealings with Government agencies. Some businesses may have otherwise left a dispute unaddressed if pursuing a complaint with a larger Government agency was perceived as difficult. It is hard to estimate the possible change in the volume of such disputes, particularly as parties would still be encouraged to pursue disputes through existing internal complaints processes in the first instance. It is anticipated that as an advocate, the Ombudsman would also play a role in helping officials understand how to improve small business engagement and avoid disputes in the future.

Quantitative benefits

Dispute resolution

10.165 The Ombudsman's own ADR service (pre-mediation and formal mediation) is intended to offer businesses an alternative process to address a dispute compared with more formal court and tribunal proceedings. It does not preclude participants from seeking concurrent assistance from other sources.

10.166 There is a regulatory saving to small businesses accessing the Ombudsman's own ADR service rather than proceeding to court. It is assumed that a proportion of the matters that are within the scope of the Ombudsman's own ADR service (small business disputes relating to Commonwealth Government agencies, international trade and interstate trade) would have been pursued through the Federal Court system. This would result in fewer cases being taken through the courts, resulting in a minor regulatory saving from time taken to apply to the Federal Court.

10.167 The following assumptions have been made to calculate these costs:

- Time taken to complete Federal Court application form: 1 hour
- Staff costs of a General Manager level staff member to complete form: \$64.3 per hour.
- A third of cases resolved through the Ombudsman's own ADR service would have otherwise been pursued through the courts.

10.168 It is expected that this would result in a regulatory savings of \$7,021.64 per year. These avoided costs have been included in the RBM.

Own ADR process

10.169 There will be a broader economic saving to businesses that have been able to resolve disputes through the Ombudsman's own ADR service rather than pursuing it through the courts. The following assumptions have been made to quantify these economic savings.

- One third of the matters proceeding through the Ombudsman's ADR service would have otherwise been pursued through a Commonwealth jurisdiction court.
- Only parties reaching an agreement through the ADR process would have avoided these costs (if still unresolved, parties may choose to escalate the matter through the courts).
- The average out-of-pocket costs of litigation through the Federal Court is \$111,120 for the applicant and \$99,805 for the respondent.¹⁷ Stakeholder feedback was that initial proxy of state Supreme Court costs (around \$50,000) was too low. Examples of typical legal costs provided were include court fees (\$5,000); discovery (\$35,000); Barrister briefing (\$20,000), trial cost per day (\$10,000).
- Staff costs are (at least) twice those of participating in mediation per party. Litigation processes are estimated to take up to 6 months compared to 8-12 weeks for mediation. This equates to \$7,079 per party.
- A third of cases resolved through the Ombudsman's own ADR service would have otherwise been pursued through the courts.

10.170 The avoided court costs per resolved case is estimated to be \$225,083.

10.171 The net economic benefit of this initiative is outlined in the **Table 10.8** below. The net regulatory burden is outlined in **Table 10.9** below.

17 Attorney-General's Department (Access to Justice Taskforce), 2009, *A strategic framework for access to justice in the Federal Civil Justice system*, p 41, <http://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf>, accessed 17 April 2015. Mean professional fees and disbursements for the Federal Court.

Table 10.8: Summary of economic costs and savings per year

<i>Total Economic costs</i>	<i>Number of cases (#)</i>	<i>Cost per case (\$)</i>	<i>Total (\$)</i>
Advocacy			186,429
Dispute Resolution (Light Touch)	53	1949	103,697
Dispute Resolution (Mediation)	356	17035	6,065,219
<i>Total cost</i>			<i>6,355,346</i>
Total Federal Court costs avoided	109	225083	-24,564,028
Net economic benefit			-18,208,682

Table 10.9: Regulatory burden and cost offset estimate table

<i>Average annual regulatory costs (from business as usual)</i>				
Change in costs (\$million)	Business	Community Organisations	Individuals	Total change in cost
Total, by sector	-0.007			-0.007
Cost offset (\$ million)	Business	Community organisations	Individuals	Total, by source
Agency				
Are all new costs offset? <input type="checkbox"/> Yes, costs are offset <input type="checkbox"/> No, costs are not offset <input checked="" type="checkbox"/> Deregulatory—no offsets required				
Total (Change in costs – Cost offset) (\$million) = -\$0.007				

Qualitative benefits*Advocacy*

10.172 The benefits to small business from the Ombudsman's advocacy role are difficult to quantify, however there are a wide range of qualitative benefits.

10.173 By receiving concerns and complaints from small businesses, the Ombudsman will be well positioned to identify emerging or existing issues that are affecting small businesses nationally. As a voice for small businesses, the Ombudsman will advise Government policy makers on how proposed policies and regulations will, and are, impacting small businesses. For example, the Ombudsman may help monitor and report on the efficacy of industry codes of conduct and fair trading provisions, the behaviour of regulators in undertaking compliance activities, and responsiveness and effectiveness of agency complaints mechanisms.

10.174 Economic savings to businesses will be in the form of time and costs saved from a reduced compliance burden resulting from the Ombudsman identifying where improvements to legislation, regulation or practices can reduce the regulatory burden on small business. These savings are difficult to quantify.

10.175 By granting the Ombudsman statutory independence, the Government can provide the role with a credible base from which to advocate the fair treatment of small business within government and the community more broadly. It will further allow the Ombudsman to receive, consider and report on small business issues and complaints in a truly independent manner.

10.176 The Ombudsman will also be an advocate amongst the business community by encouraging the fair treatment of small businesses, best commercial practice between all businesses, improved management practices within small businesses, and forward planning to address known smaller family enterprise issues such as succession planning. This could help improve the operating environment for all businesses, and may also help alleviate the incidence of business to business disputes through the adoption of best practice principles by businesses of all sizes.

10.177 To dispel perceptions that the Ombudsman unduly favours one set of interests in the conduct of its dispute resolution activities, the Ombudsman's advocacy functions will be separate from the functions concerned with dispute resolution. This will be achieved through the use of a panel of specialist alternative dispute resolution providers, and by requiring any specialists employed directly by the Ombudsman to be functionally separate to the broader activities of the Ombudsman.

10.178 Similar to the Ombudsman's dispute resolution function, the Ombudsman's advocacy function is expected to have positive impacts on the behaviour of businesses. Anecdotal feedback from the Australian Small Business Commissioner has highlighted that some businesses, particularly larger businesses, have welcomed the Commissioner raising practices of concern to their attention. This has enabled them to review their practices and revise their practices so they are more small business friendly.

Dispute resolution

10.179 As a concierge for dispute resolution, the Ombudsman will help address the information gap small businesses face in understanding what justice mechanisms are available to them to address a complaint or dispute. By providing information, advice, and direct referrals, small business will be able to make more informed decisions about how they want to pursue their complaint. This process will also save them time they would have otherwise spent researching information on dispute resolution processes and reaching an appropriate complaints body.

10.180 Importantly, as a first step, when a small business brings an issue to the Ombudsman, the Ombudsman will ask fundamental questions about the nature of the dispute. This could include whether the small business has a contract in place, or whether the small business has discussed the issue directly with the other party. This process in itself can help small businesses understand their own actions in managing disputes and how they can improve their own business practices such as contract management and managing business relationships.

10.181 The Ombudsman's own ADR service will also address gaps in the current range of alternative dispute resolution services available to small businesses. Research and preliminary stakeholder consultation on the dispute resolution services and complaints bodies available to small businesses at the Commonwealth level indicates that the Ombudsman would be an appropriate body to deal with a range of small business disputes.

10.182 While the Ombudsman will have powers to require parties to attend mediation, it is intended that where possible, the Ombudsman will seek to resolve disputes through initial information and referrals and pre-mediation activities. Providing support and advice to businesses on how they can address their dispute can lead to improved business practices as business owners learn from their experience and avoid disputes in the future.

10.183 There will be cases where the respondent in a dispute does not wish to participate in mediation. The power to require parties to attend mediation may be a cost to business, but this will ensure that a genuine alternative to the courts is available. This will boost small business confidence in their dealings with other businesses; particularly larger ones where there would otherwise be a considerable power imbalance were a dispute to arise. It also provides a mechanism for ensuring that businesses are not forced to close due to unresolved disputes and, further, in many cases, allows for productive business relationships to continue.

Benefits associated with the Ombudsman's powers

10.184 It is anticipated that the Ombudsman's dispute resolution role, and the associated powers will have a positive impact on the behaviour of small and large businesses and improve the efficient operation of the market more generally. It is plausible that some businesses may become more risk adverse or reluctant to do business with small businesses as a result of the introduction of the Ombudsman's dispute resolution function. This is considered a very small risk as the Ombudsman's dispute resolution functions are not intended or designed to replace the existing recourse businesses have to pursue issues through the courts and tribunals.

10.185 Further, ADR processes are designed as a low-cost, timely way for parties to address a dispute and facilitate a shared agreement on how to move forward. The estimated out-of-pocket and staff expenses are relatively low and are not expected to be passed on to consumers through the price of goods and services offered by businesses.

10.186 The Ombudsman will send enquiries to existing services (that is, maintaining the status quo) and will have a narrow scope of disputes to address through its own service. Generally, the Ombudsman will not publicly report on the individual parties that access the Ombudsman services, or the nature of their dispute. Therefore small businesses will not be reluctant to pursue the dispute for fear of retribution or being seen as being difficult to deal with.

10.187 A key objective of the Ombudsman's dispute resolution services is to facilitate parties to a dispute to voice their side of the story and come to an agreed position. That is why the Ombudsman will not have determinative powers. This is supported by discussions with the Western Australian Small Business Commissioner who considers that when offering alternative dispute resolution services, co-operation is more likely without such powers.

10.188 The Ombudsman's power to name unco-operative parties is intended to incentivise all parties to a dispute (businesses of all sizes and government agencies) to participate in the Ombudsman's dispute resolution processes. The reputation of organisations that are publicly named are expected to be adversely affected, which could potentially lead to lost business, however this is difficult to quantify. It is also difficult at this stage to estimate the number of businesses that might be affected, however it is intended that the Ombudsman would exercise this power sparingly.

10.189 It is expected that small businesses that access alternative dispute resolution services will build their knowledge of the dispute resolution mechanisms available to them, and improve their own processes and practices to avoid similar disputes in the future. For larger businesses, working through a dispute, or having the Ombudsman raise a practice of concern to small businesses, may help them identify how they can improve their own practices to be more small business friendly.

10.190 It is not anticipated that this function will have an adverse consequence on consumers. The dispute resolution services offered by the Ombudsman will be low-cost. In aggregate, it is important to note that the broad benefits of an effective civil justice system are significant. As the Productivity Commission has stated:

‘a well-functioning civil justice system serves more than just private interests — it promotes social order, and communicates and reinforces civic values and norms. A well-functioning system also gives people the confidence to enter into business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia’s economic performance.’^{18c}

10.191 The Ombudsman’s role in providing dispute resolution services will contribute towards the effective functioning of Australia’s civil justice system. This includes the economic benefits and associated behavioural changes that can arise from improved business and consumer confidence in establishing and maintaining business relationships.

Option 3: Establish a Small Business and Family Enterprise Ombudsman with more limited powers

10.192 The powers of the Ombudsman under this option are not expected to have a regulatory cost on businesses as participation in the Ombudsman’s services would be voluntary given the Ombudsman has no power to require parties to provide information or attend mediation. This option is not preferred as it does not provide an effective response to the problems outlined in Chapter 2.

10.193 Establishing a statutorily appointed Small Business and Family Enterprise Ombudsman with a range of powers and with a formal framework to provide a range of alternative dispute resolution processes does go some way toward addressing the problems outlined in Chapter 2. The Ombudsman will still be able to provide information and advice to small businesses on what mechanisms are available to them to resolve a dispute.

10.194 The powers to require parties to attend mediation (by imposing a penalty for failure to attend mediation) are used as an incentive for parties to formally discuss disputes in a clear, accessible framework. This process seeks to resolve disputes early, helping to preserve the business relationship and avoid the high costs of court proceedings.

10.195 Under this option, the Ombudsman will not be as effective in facilitating the resolution of disputes. The intention of the Ombudsman is to facilitate the most appropriate commercial outcome for both parties in a dispute. To achieve this, both parties must be willing to fully engage with this process and provide all the information and facts about the issue at hand. Facilitating a resolution will be difficult if the Ombudsman is not

18 Productivity Commission 2014, *Access to Justice Arrangements*, Draft Report Overview, Canberra, pg. 7

able to incentivise parties (particularly where there is a power imbalance between the parties) to participate in discussions about the issue at hand and to ensure that all parties are making decisions based on the same information.

10.196 The Western Australia Small Business Commissioner has advised that, in the last two years of providing alternative dispute resolution processes by the Western Australia Small Business Development Corporation, there has been a small number of instances where stronger mechanisms to engender greater participation from parties would have been helpful and improved outcomes to disputes. A balance needs to be struck between influencing parties to voluntarily participate in resolving disputes and ensuring that there are consequences for parties that refuse to provide information in reasonable timeframes or participate in dispute resolution in a meaningful way. These behaviours are invariably detrimental to small business owners who have insufficient resources to utilise the judicial system. Without appropriate powers to mitigate the impact of these behaviours, the Ombudsman would be less likely to contribute to the effective functioning of the civil justice system, and the broader benefits that may arise when this system functions well.

10.197 This feedback is supported by the experience of the Victorian Small Business Commissioner. The *Small Business Commissioner Act 2003* (Vic) does not provide the Victorian Small Business Commissioner an explicit power to require businesses to provide information in relation to a dispute. In 2013-14, 51.7 per cent¹⁹ of respondent parties to general business dispute applications (as opposed to applications specifically relating to its other dispute resolution functions such as retail and farm mediation) refused to engage with the Office of the Victorian Small Business Commissioner. Including all dispute applications, this response rate is better, with around 20 per cent respondents which refused to engage with the Office. Applying this rate to the Ombudsman's ADR service under this option, at a minimum, half of the cases dealt with in the pre-mediation phase would not be resolved. This would subsequently reduce the number of cases proceeding through to mediation. Without the ability to incentivise parties to discuss the issue, the Ombudsman's ability to resolve disputes at an early stage is limited.

19 Victorian Small Business Commissioner, 2013, *Annual Report 2013-14*, p 21.

RIS Question 5: Consultation

10.198 Treasury has undertaken two interactive formal public consultation processes, in addition to ongoing stakeholder discussions, on the scope and powers of the Ombudsman.

- A policy discussion paper on the broad scope and powers of the Ombudsman role (May 2014);
- Exposure draft legislation establishing the role and specifying the functions and powers of the Ombudsman (March-April 2015).

Policy discussion paper

10.199 Preliminary discussions were held in February 2014 with the Australian Small Business Commissioner, the Australian Competition and Consumer Commission, the Commonwealth Ombudsman, the four state-based small business commissioners, and state and territory government officials to seek their high level views on the scope of the functions of the Ombudsman.

10.200 Feedback from the preliminary consultations was used to develop a discussion paper on the nature and scope of the four key responsibilities of the Ombudsman outlined in the Government's election commitment and how to best provide the Ombudsman with appropriate powers to deliver benefits to Australian small businesses. On 30 April 2014, the Minister for Small Business released the discussion paper inviting interested stakeholders to put forward their views on the role.

10.201 Recognising that many stakeholders, particularly small businesses, are time-poor, interested parties were invited to provide views on issues raised in the discussion paper in one of two ways. A formal written submission could be provided, or a brief comment could be submitted through an online form on the Treasury website. The paper was also published on the Business Consultation Website available through business.gov.au.

10.202 Submissions on the discussion paper closed on 23 May 2014; 53 submissions were received. These submissions, along with a summary of the issues raised, were published on the Treasury website.

10.203 Treasury officials also conducted a series of detailed, one-on-one, meetings with 30 targeted stakeholders in early May to discuss their view directly. Meetings were held in Canberra, Sydney,

Melbourne and via teleconference. These stakeholders are listed in Appendix A. Treasury also engaged with its portfolio agencies to engage with existing small business consultative mechanisms, including the Australian Competition and Consumer Commission's Small Business Consultative Committee.

Exposure draft legislation

10.204 Following the discussion paper consultations, on 18 August 2015, the Government announced²⁰ its chosen model for the scope of the Ombudsman's functions, confirming the Ombudsman would be a:

- Commonwealth-wide advocate for small businesses and family enterprises;
- Concierge for dispute resolution service; and
- Contributor to the development of small business friendly Commonwealth laws and regulations.

10.205 The Ombudsman would also link with the Government's single business service to help small businesses easily find out about other Government services and programmes, including general business advice.

10.206 Draft legislation, detailing specific powers for the role, was subsequently developed. Treasury conducted a public consultation process on the exposure draft of the Australian Small Business and Family Enterprise Ombudsman Bill (Bill) between 11 March and 7 April 2015. Similar to the engagement mechanisms used during the policy discussion paper consultation process, the Treasury invited written submissions from stakeholders on the provisions in the Bill. Treasury received 44 written submissions and held face to face meetings and teleconferences with 43 organisations.

10.207 Submissions unanimously supported the establishment of the Ombudsman. Comments touched on both specific provisions in the legislation and broader implementation and operational issues. Concerns extended to the definition of small business; the advocacy function; referral mechanisms of disputes and scope of the Ombudsman's own dispute advice; the definition of agency; the Ombudsman title; and governance arrangements.

20 The Hon Bruce Billson MP, Media Release, *Small Business Assistance to be Strengthened*, issued 18 August 2014. Available at: <http://bfb.ministers.treasury.gov.au/media-release/045-2014/>.

10.208 Stakeholder feedback from the policy discussion paper and exposure draft legislation consultation processes through this process has been incorporated under discussion on policy options.

RIS Question 6: What is the best option from those you have considered

10.209 The preferred option is that the Government establish the Ombudsman in accordance with Option 2 as outlined under RIS Question 3. This option provides a net economic benefit of \$18,208,682 per annum.

10.210 A thorough review and consultation process has resulted in a number of suggestions of how to best implement the Government's election commitment to transform the Australian Small Business Commissioner into the Australian Small Business and Family Enterprise Ombudsman.

10.211 The proposed functions and powers outlines in the Bill will improve the operating environment for small business; reduce unnecessary compliance burdens; and assist small business and family enterprises to resolve disputes early, helping to preserve the business relationship and avoid the high costs of court proceedings.

10.212 Stakeholders supported the establishment of a statutory position with powers to equip the Ombudsman to achieve genuine outcomes for small businesses. Stakeholders also supported the Ombudsman to advocate small business concerns to the Government and provide dispute resolution support.

RIS Question 7: How will you implement and evaluate your chosen option?

Implementation

10.213 The Australian Small Business and Family Enterprise Ombudsman Bill will establish the Ombudsman role. An exposure draft of this legislation was released for public consultation between 11 March and 7 April 2015. Feedback on the exposure draft has been taken into account in finalising the Bill. The office of the Ombudsman will commence operations on proclamation of the Act. It is expected that this will take place in the second half of 2015.

10.214 The Office of Ombudsman will build on the existing Office of the Australian Small Business Commissioner. Sufficient accommodation (based in Canberra) is available within the existing Office of the Commissioner to provide for the expanded activities. Work has commenced on developing new branding and marketing for the new role. A communications strategy, particularly in the first year of operation, will be developed to actively engage with stakeholders to build awareness and understanding of the scope of the role. The existing Australian Small Business Commissioner Information Line, delivered through the Department of Industry and Science's single business service will be revised to meet the requirements for the Ombudsman.

10.215 The Office of the Commissioner does not provide an ADR service. As the Ombudsman's ADR service must be at arm's-length, the office will manage a procurement process to develop an outsourced provider arrangement. This office of the Ombudsman will be able to build on the Dispute Assist tool developed by the Australian Small Business Commissioner to help small businesses identify what existing ADR providers they could approach for support. The Office will also develop MoUs with existing service providers to ensure smooth referral of matters.

Evaluation

10.216 The Bill includes provisions for the Ombudsman's functions to be formally reviewed at regular intervals. The review must consider:

- the kinds of assistance requested during the period being reviewed;
- whether the assistance given was convenient and effective for the operators of small businesses and family enterprises who requested assistance;
- whether amendment of the Act is needed to more conveniently and effectively assist the operators of small businesses and family enterprises.

10.217 The Minister must appoint a suitably qualified person to conduct the review. This person must have sufficient independence from the Ombudsman, the Minister and the Department to conduct the review impartially.

10.218 The Bill states that the first review must be completed, and a written report given to the Minister, no later than 30 June 2017. Subsequent reviews must be conducted every four years. A copy of the review must be tabled in Parliament.

Appendix A

Consultation on April 2014 Small Business and Family Enterprise Ombudsman Discussion Paper

Table 10.10: Organisations which provided a submission

Accord Group
Australasian Association of Convenience Stores
Australia Marketing Pty Ltd
Australian and New Zealand Ombudsman Association
Australian Automotive Dealer Association
Australian Bankers' Association Inc.
Australian Chamber of Commerce and Industry
Australian Chamber of Fruit and Vegetable Industries Limited
Australian Finance Conference
Australian Motor Industry Federation
Australian Newsagents' Federation
Australian Sporting Goods Association Inc.
Business Enterprise Centres of Australia
Business SA
Combined Small Business Alliance of WA
Commonwealth Ombudsman
Council of Small Business of Australia
CPA Australia
Dwyer Lawyers
Energy and Water Ombudsman (Victoria)
Financial Ombudsman Service
Franchise Council of Australia
Franchwise
Housing Industry Association
Independent Contractors Australia
Institute of Public Accountants
Insurance Council of Australia
International Ombudsman Institute
Intuit Inc.

Table 10.10: Organisations which provided a submission (continued)

Law Council of Australia
Law Society of New South Wales
LEADR
Mazzarol, Professor Tim
National Farmers' Federation
Negocio Resolutions
News Corp Australia
NSW Business Chamber
NSW Small Business Commissioner
Pallet Loss Prevention Pty Ltd
Public Transport Ombudsman
RD Williams Pty Ltd
Restaurant & Catering Industry Association
Small Business Association of Australia
South Australian Small Business Commissioner
Tasmanian Department of State Growth (formerly Department of Economic Development, Tourism and Arts)
Telecommunications Industry Ombudsman
Tolling Customer Ombudsman
Victorian Department of State Development, Business and Innovation
Victorian Ombudsman
Victorian Small Business Commissioner
WA Small Business Development Corporation

Table 10.11: Organisations which participated in targeted meetings

<i>Organisation</i>
Attorney General's Department
Australasian Association of Convenience Stores
Australian and New Zealand Ombudsman Association
Australian Chamber of Commerce and Industry
Australian Motor Industry Federation
Australian Newsagents' Federation
Australian Retailers Association
Business Council of Australia

Table 10.11: Organisations which participated in targeted meetings (continued)

<i>Organisation</i>
Business Enterprise Centres Australia
Carix
COSBOA
CPA Australia
Department of Agriculture
Department of Tourism, Major Events, Small Business and the Commonwealth Games (QLD)
Family Business Australia
Financial Ombudsman Service
FINH
Franchise Council of Australia
Independent Contractors Australia
Institute of Public Accountants
LEADR
NSW Small Business Commissioner
Post Office Agents Association Limited
Restaurant and Catering Industry Association
Shopping Centre Council of Australia
Small Business Association of Australia
Small Enterprise Association of Australia and New Zealand
SME Association of Australia
Telecommunications Industry Ombudsman
The Accord Group

Consultation on exposure draft legislation**Table 10.12: Formal submissions**

1	ACT Civil and Administrative Tribunal
2	Astroglide Pty Ltd (CONFIDENTIAL SUBMISSION)
3	Australian and New Zealand Ombudsman Association
4	Australian Automotive Dealer Association Ltd
5	Australian Bankers Association Inc
6	Australian Dairy Farmers
7	Australian Finance Conference Ltd

Table 10.12: Formal submissions (continued)

8	Australian Motor Industry Federation
9	Australian National Retailers Association
10	Australian Securities and Investments Commission (ASIC)
11	Australian Taxation Office (CONFIDENTIAL SUBMISSION)
12	Australian Women’s Chamber of Commerce and Industry
13	AUSVEG
14	Customs and Border Protection
15	Deloitte Private Pty Ltd
16	Department of Finance
17	Department of Foreign Affairs and Trade (Trade, Investment and Economic Diplomacy Division)
18	Department of Infrastructure and Regional Development
19	Energy & Water Ombudsman NSW
20	Fair Work Ombudsman
21	Financial Ombudsman Service
22	Franchise Council of Australia
23	Insurance Council of Australia
24	Intuit Australia
25	Kirit Ruparelia
26	Law Council of Australia (SME Committee)
27	Ufuomanefe Levy (Nefe’s Family Daycare)
28	LEADER and IAMA
29	Mediator Standards Board
30	Motor Trades Association Queensland
31	Mr Hamilton Dwight Walker
32	National Farmers Federation
33	NSW Small Business Commissioner
34	Queensland Department of Tourism, Major Events, Small Business and the Commonwealth Games
35	Queensland Energy and Water Ombudsman
36	Restaurant and Catering Australia
37	Shopping Centre Council of Australia
38	South Australia Chamber of Commerce and Industry
39	South Australia Small Business Commissioner
40	Telecommunications Industry Ombudsman (TIO)

Table 10.12: Formal submissions (continued)

41	Victorian Energy and Water Ombudsman
42	Victorian Small Business Commissioner
43	WA Small Business Commissioner
44	Winemakers Federation of Australia

Table 10.13: Face to face and teleconference consultations

	<i>Organisation</i>	<i>Meeting location/ teleconference</i>
1	Australasian Association of Convenience Stores	Teleconference
2	Australia and New Zealand Ombudsman Association / Telecommunications Industry Ombudsman	Melbourne
3	Australian Bankers' Association Ltd	Sydney
4	Australian Capital Territory Economic Directorate	Canberra
5	Australian Chamber of Fruit and Vegetable Industries	Brisbane
6	Australian Competition and Consumer Commission	Teleconference
7	Australian Food and Grocery Council	Teleconference
8	Australian Retailers' Association	Sydney
9	Australian Women's Chamber of Commerce and Industry	Teleconference
10	Business Enterprise Centres Australia	Teleconference
11	CPA Australia	Melbourne
12	Family Business Australia	Melbourne
13	Financial Ombudsman Service	Teleconference
14	Franchise Council of Australia	Melbourne
15	Fully Integrated Family Business (FINH) Pty Ltd	Teleconference
16	Independent Contractors Australia	Teleconference
17	Inspector General of Taxation	Sydney
18	Institute of Public Accountants	Melbourne
19	LEADR — Association of Dispute Resolvers	Sydney
20	National Farmers Federation	Canberra
21	National Measurement Institute	Sydney
22	National Retail Association	Teleconference
23	New South Wales Business Chamber	Sydney
24	New South Wales Ombudsman	Teleconference
25	New South Wales Small Business Commissioner	Sydney
26	Northern Territory Department of Business	Teleconference

Table 10.13: Face to face and teleconference consultations (continued)

27	Office of Parliamentary Counsel; Department of the Prime Minister and Cabinet; Office of the Commonwealth Ombudsman; Office of the Australian Small Business Commissioner (joint meeting)	Canberra
28	Post Office Agents Association Ltd	Teleconference
29	Queensland Chamber of Commerce and Industry	Brisbane
30	Queensland Department of Tourism, Major Events, Small Business and the Commonwealth Games	Brisbane
31	Restaurant and Catering Industry Association	Teleconference
32	Shopping Centre Council of Australia	Sydney
33	Small Business Association Australia	Teleconference
34	Small Enterprise Association of Australia and New Zealand	Sydney
35	South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy	Teleconference
36	South Australian Small Business Commissioner	Teleconference
37	Tasmanian Department of Economic Development	Teleconference
38	Victorian Department of State Development, Business and Innovation and Victorian Small Business Commissioner (joint meeting)	Melbourne
39	Victorian Employers' Chamber of Commerce and Industry	Melbourne
40	Victorian Farmers' Federation	Melbourne
41	Victorian Ombudsman	Melbourne
42	Victorian Small Business Commissioner	Melbourne
43	West Australian Small Business Commissioner	Teleconference

Appendix B

Activities and Activities and powers for status quo, option 2, option 3

<i>Function</i>	<i>Status quo (Australian Small Business Commissioner)</i>	<i>Option 2 — Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) — heavier powers</i>	<i>Option 3 — Australian Small Business and Family Enterprise Ombudsman — lighter powers</i>
Commonwealth-wide advocate for small businesses and family enterprises	<p>Activities</p> <p>Advocate and represent small business and family enterprise interests and concerns to the Australian Government both at the Minister's request and on own initiative.</p> <p>Make representations on behalf of small businesses to appropriate bodies.</p> <p>Powers</p> <p>Nil.</p>	<p>Activities</p> <p>Undertake research and inquiries into legislation, policies and practices affecting small businesses and family enterprises;</p> <p>Report and gives advice to the Minister on those matters;</p> <p>Contribute to inquiries by others into those matters;</p> <p>Contribute to developing national strategies on those matters;</p> <p>Review proposals relating to those matters and advises the Minister on them;</p> <p>Promote best practice in dealing with small businesses and family enterprises.</p>	<p>Activities</p> <p>As per option 2.</p> <p>Powers and responsibilities to be legislated</p> <p>As per option 2 <i>except</i> for the following powers that would not be provided:</p> <p>Ability to require information from parties (as a penalty there would be an option to publicly name unco-operative parties).</p>

<i>Function</i>	<i>Status quo (Australian Small Business Commissioner)</i>	<i>Option 2 — Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) — heavier powers</i>	<i>Option 3 — Australian Small Business and Family Enterprise Ombudsman — lighter powers</i>
		<p>Powers and responsibilities to be legislated</p> <ul style="list-style-type: none"> • Ability to investigate ‘relevant legislation, policies and practices’ (own-motion or on request of Minister) relating to: <ul style="list-style-type: none"> – Commonwealth and Territory agencies; – constitutional corporations ; – any entity engaged in international trade or commerce; – any entity engaged in trade or commerce among the States, within a Territory, between Territories or between a state and a territory; – any entity in relation to insurance, banking, telecommunications, copyright, patents, designs or trademarks; and – any entity that is operated by those living in or is located in a Territory. • Power to conduct, and take evidence in, hearings. • Ability to require a person to produce information or documents or attend hearings, with at least 10 business days’ notice. Can apply a financial penalty of 	

<i>Function</i>	<i>Status quo (Australian Small Business Commissioner)</i>	<i>Option 2 — Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) — heavier powers</i>	<i>Option 3 — Australian Small Business and Family Enterprise Ombudsman — lighter powers</i>
		<p>30 penalty units for non-compliance.</p> <ul style="list-style-type: none"> • Power to seek external advice and engage external consultants. • Prepare reports for presentation to the Minister. 	

Function	Status quo <i>(Australian Small Business Commissioner)</i>	Option 2 — Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) — heavier powers	Option 3 — Australian Small Business and Family Enterprise Ombudsman — lighter powers
<p>Concierge for dispute resolution and operation of a mediation service</p>	<p>Activities Provide information, guidance materials and support to small businesses and family enterprises. Refer complaints to existing dispute resolution providers where appropriate. Make preliminary inquiries in response to complaints.</p> <p>Powers Nil.</p>	<p>Activities Respond to requests for assistance by an operator of a small business or family enterprise. Provide information, guidance materials and support to small businesses and family enterprises. Refer complaints to existing dispute resolution providers where appropriate. Refer complaints to own dispute resolution service where appropriate. Reject/refer complaints which are vexatious or better dealt with by another entity.</p> <p>Powers and responsibilities to be legislated Must transfer a request for assistance to another Commonwealth, state or territory agency, if that agency could deal with the request and it would be more effective and convenient for that agency to do so. May work co-operatively with other agencies of the Commonwealth, the States and the Territories if it is more convenient and effective to do so. May recommend that an ADR process be undertaken. If an entity does not undertake that process, or withdraws from that process,</p>	<p>Activities As per option 2.</p> <p>Powers and responsibilities to be legislated As per option 2 <i>except</i> for the following powers that would not be provided: Ability to require information from parties in dispute (can apply a financial penalty for non-compliance). Ability to publicly name parties which refuse to participate or withdraw from the recommended ADR process.</p>

<i>Function</i>	<i>Status quo (Australian Small Business Commissioner)</i>	<i>Option 2 — Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) — heavier powers</i>	<i>Option 3 — Australian Small Business and Family Enterprise Ombudsman — lighter powers</i>
		<p>the Ombudsman may publish that fact.</p> <p>Ability to require information from parties in dispute (can apply a financial penalty for non-compliance).</p> <p>May keep a list of ADR providers.</p> <p>May set appropriate fees for own dispute resolution processes, including cancellation fees.</p> <p>Must not directly conduct ADR process.</p>	
Ministerial Direction	<p>Activities Report directly to the Minister on significant small business issues.</p> <p>Powers Nil.</p>	<p>Activities Report regularly to the Minister on significant small business issues. Develop and report on an annual work program. Report on outcomes of research and inquires to Minister.</p> <p>Powers and responsibilities to be legislated Conduct inquiries into issues at the direction of the Minister and prepare reports for presentation to the Minister. For reports prepared under Ministerial direction, the Minister will be required to table reports in each House of Parliament within 25 sitting days after the Minister</p>	<p>Activities As per option 2.</p> <p>Powers and responsibilities to be legislated As per option 2.</p>

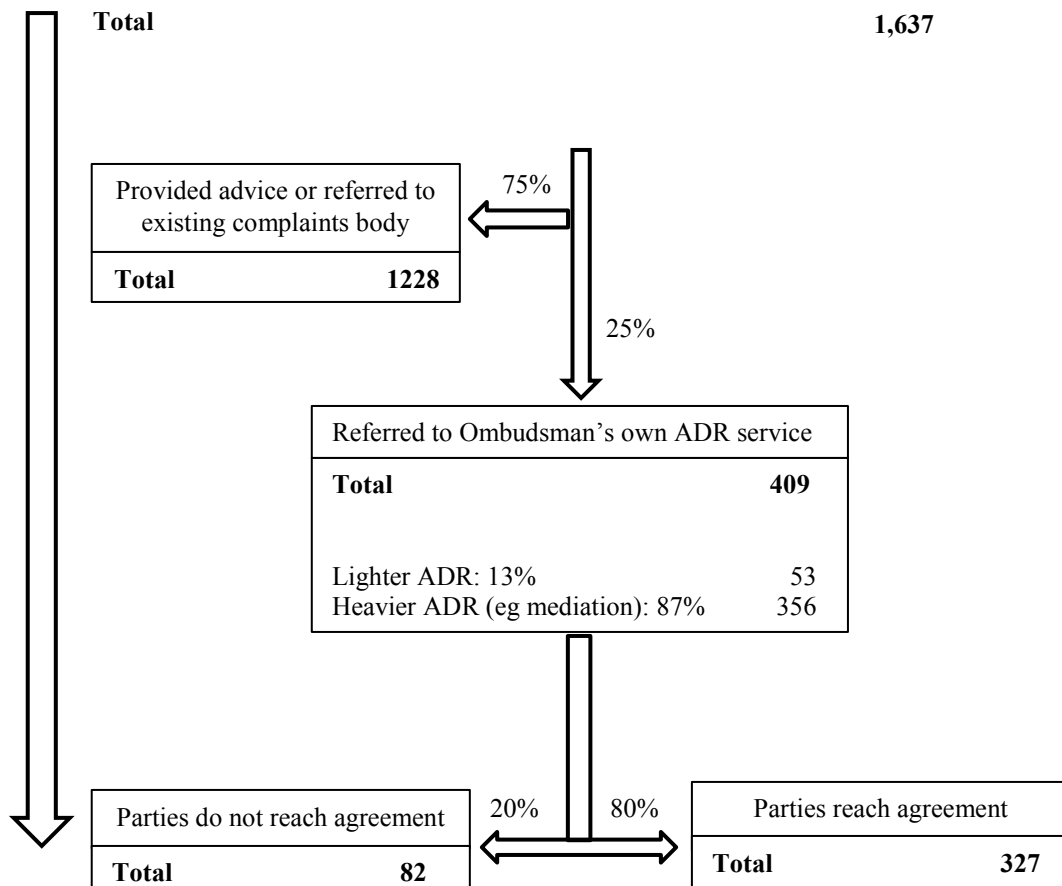
Function	Status quo <i>(Australian Small Business Commissioner)</i>	Option 2 — Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) — heavier powers	Option 3 — Australian Small Business and Family Enterprise Ombudsman — lighter powers
		<p>receives a report.</p> <p>Allowance for right of reply for parties named in the finalisation of reports to the Minister.</p> <p>Provide an annual report to Parliament through the Department (Treasury).</p>	
Appointment	<p>Employed under a contract</p> <p>Powers</p> <p>Nil.</p>	<p>Activities</p> <p>Not applicable</p> <p>Powers and responsibilities to be legislated</p> <p>Statutory appointment by the Governor-General.</p> <p>Minister may appoint an acting Ombudsman, which may be a public servant, as required.</p> <p>Up to 5 year term, eligible for re-appointment by the Governor-General.</p> <p>Termination by Governor-General under usual terms for statutory appointments.</p>	<p>Activities</p> <p>Not applicable</p> <p>Powers and responsibilities to be legislated</p> <p>As per option 2.</p>

Appendix C

Case volumes process in the Office of the Australian Small Business and Family Enterprise Ombudsman

Complaints and enquires

Source	Total received
Commonwealth Ombudsman (Cat 2 referrals)	242
Australian Small Business Commissioner (Cwth)	414
Interstate/National disputes (from state SBCs)	46
International disputes (from state SBCs)	23
Australian Competition and Consumer Commission	912
Total	1,637



Chapter 11

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Australian Small Business and Family Enterprise Ombudsman Bill 2015

11.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

11.2 The purpose of the Bill is to establish the Australian Small Business and Family Enterprise Ombudsman to advocate for, and give assistance to, small businesses and family enterprises.

Human rights implications

11.3 This Bill does not engage any of the applicable rights or freedoms.

Conclusion

11.4 This Bill is compatible with human rights as it does not raise any human rights issues.

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Australian Small Business and Family Enterprise Ombudsman Bill 2015
Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015

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Australian Small Business and Family Enterprise Ombudsman Bill 2015
Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015

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Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Bill 2015

Schedule 1: Consequential amendments

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1	8.7 to 8.13

Schedule 2: Transitional provisions

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1	9.4