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Attention: Hon Paul Papalia CSC MLA
By email: Minister.Papalia@dpc.wa.gov.au

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SMALL BUSINESS DEVELOPMENT CORPORATION AMENDMENT BILL 2019

I refer to the request from your Office for advice concerning the proposed exemption for Ministers and ministerial staff from the investigative powers of the Small Business Commissioner (**WA Commissioner**) under section 14A of the Small Business Development Corporation Amendment Bill 2019 (**Bill**).

1. BACKGROUND

On 15 August 2019, Members of the Western Australian Legislative Assembly debated the issue of whether the WA Commissioner should have jurisdiction to investigate Ministers and ministerial staff (as would be the case if section 14A of the Bill contained no exemption).

During that debate, it was suggested that the Bill be amended to exclude Ministers and ministerial staff from investigation by the WA Commissioner on two grounds;

- (a) first, to avoid a conflict arising in the event that the WA Commissioner exercises his or her power to investigate a Minister to whom he is also required to report on the conclusion of that investigation ; and
- (b) secondly, that the Australian Small Business and Family Enterprise Ombudsman (**ASBFE Ombudsman**) does not have power to investigate Ministers and ministerial staff, and it is therefore inappropriate for the WA Commissioner to have such powers.

This advice addresses those issues in particular, and related issues that arise when considering whether Ministers should be exempt from the investigative powers of the WA Commissioner.

2. SUMMARY OF ADVICE

- (a) Of the States that have equivalent small businesses legislation, none exempt Ministers or ministerial staff from the jurisdiction of the relevant Commissioner;

doing so in Western Australia (WA) would therefore place WA at variance with the position in every other jurisdiction;

- (b) It is a matter of policy as to whether any individuals (such as Ministers or ministerial staff) should be exempted from the investigative powers of an investigative body;
- (c) The policy reasons advanced as set out in the Background Section above do not, on their face, appear to provide sufficient justification for the exemption, although of course the matter is obviously for Government and Parliament to determine.

3. DISCUSSION

The proposed amendment to exclude Ministers and ministerial staff is advanced for two reasons:

- (a) to avoid a conflict arising in the event that the WA Commissioner exercises his or her power to investigate a Minister to whom he is also required to report on the conclusion of that investigation; and
- (b) on the fact that the ASBFE Ombudsman does not have powers to investigate Ministers and ministerial staff; that is, reliance has been placed on Ombudsman legislation and not comparative small business development commission type legislation. This is significant for two reasons:-
 - (i) first, because it is not, in my respectful opinion, appropriate to seek to draw comparisons between, on the one hand, small business development type legislation as contemplated by the Bill, and, on the other hand, Ombudsman type legislation; and
 - (ii) secondly, and in any event, when one considers the comparative small business development commission type legislation that exists in other jurisdictions, there are no exemptions of the type which are being proposed in the Bill.

The conflict point raised by paragraph (a) above is perhaps addressed simply: no real conflict of interest would arise in the event that the WA Commissioner receives a complaint with respect to an action of the Minister that affects the commercial activities of a small business and exercises his powers to investigate that matter and, in the course of so doing, investigates the Minister. Regardless, proposed section 14A(1)(eb) simply contemplates the giving of a (concluded) report to the Minister. The WA Commissioner could not, of course, be in a position of conflict by the mere provision of a report to the Minister.

To the extent that the WA Commissioner was concerned about his or her ability to properly discharge his or her investigatory function, then if the Minister or the Minister's staff were involved then it would be a simple matter for the WA Commissioner to delegate that investigative function to "a person employed or engaged by the corporation": see section 14C of the Small Business Development Corporation Act 1983 (Act). Indeed, this might be considered to be sound administrative practice for the WA Commissioner to adopt in any matter involving the Minister's office as it overcomes any perceived or actual conflict.

The ASBFE Ombudsman point raised by paragraph (b) above seems, on its face, to be the more substantial issue, and so I will consider it separately along with the other points I have identified.

4. ROLES OF THE SMALL BUSINESS DEVELOPMENT COMMISSION AND OMBUDSMAN NOT COMPATIBLE

In considering the first of the matters raised at 3(b)(i) above, it is important to understand the differences between the role of a small business development commissioner, and an ombudsman.

WA Commissioner

The purpose of the Act is to, "encourage, promote, facilitate and assist the establishment, development and carrying on of small business in the State [and] to enhance a competitive and fair operating environment for small business in the State" (amongst other things). Under the Bill, the function of the WA Commissioner is essentially to receive and investigate complaints made with respect to matters that affect the commercial activities of small businesses.

Generally speaking, the overarching purpose of the small business development legislative framework is to provide support to, and advocate for, small businesses. This requires, amongst other things, investigating not only other businesses whose activities may impact on the operation of small businesses, but also government agencies whose activities do the same.

Importantly, there is nothing within the Act or the Bill which indicates or suggests that the WA Commissioner acts within a general *administrative review jurisdiction* (which of course *is* the case with ombudsman legislation); rather, the WA Commissioner's purpose is narrowly directed at supporting small businesses through receiving and investigating complaints - some of which may warrant investigating the actions of Ministers, particularly with respect to policies which affect small businesses.

The Ombudsman

The core function of the ombudsman is to receive and investigate complaints from any person who is aggrieved by some act or omission of administration by relevant government bodies.

The basis for which the ombudsman may find a complaint to be justified under the *Parliamentary Commissioner Act 1971* (WA) are similar to those in which an application for judicial review is successful, albeit wider, and includes that the action was unlawful, unreasonable, unjust, oppressive or wrong.¹ In that regard, it is helpful to understand the ombudsman, or the process of "ombudsman review", as a third line of direct public accountability for administrative action which complements merits review and judicial review.

There are, of course, sound policy reasons to justify the exclusion of ministerial actions from the jurisdiction of the ombudsman; first, that Ministers are accountable to Parliament for their administrative actions; and secondly, that Ministers should be free to carry out their day-to-day ministerial duties in confidence and without fear of investigation to ensure the efficient and proper functioning of government. Accordingly, the appropriate avenue for the review of the administrative decisions of Ministers is merits and judicial review.

The Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cth)

Given that the Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cth) (**Commonwealth Act**) has been cited as support for the proposition that there should be an

¹ Section 25(1) of the *Parliamentary Commissioner Act 1971* (WA).

exemption in the Bill in favour of Ministers and ministerial staff, it is perhaps instructive and useful to consider the position of the ASBFE Ombudsman.

The Commonwealth Act established the Australian Small Business and Family Enterprise Ombudsman (**ASBFE Ombudsman**), replacing the Australian Small Business Commissioner, which was a non-statutory role.

The ASBFE Ombudsman has two functions: an advocacy function and an assistance function. Under the advocacy function, the ASBFE Ombudsman advocates for small businesses and family enterprises in relation to relevant legislation, policies and practices of Commonwealth and Territory agencies (State agencies are excluded). To that end, the ASBFE Ombudsman may conduct an inquiry on its own initiative, or on referral by the Minister.² The advocacy function confers on the ASBFE Ombudsman information gathering powers with respect to conducting an inquiry or undertaking research. The ASBFE Ombudsman does not have power to receive complaints from small businesses directly.

Under the assistance function, the ASBFE Ombudsman may respond to requests for assistance in relation to a "relevant action" which are actions by a Commonwealth agency, an entity or a corporation that affects a small business or family enterprise.³ The ASBFE is not authorised to deal with a request for assistance if the relevant action is action taken by a Minister of the Commonwealth, or of a State or a Territory.⁴

On receiving a request for assistance, the ASBFE Ombudsman:

- (a) may decide not to provide assistance;⁵
- (b) may transfer the dispute to the appropriate agency;⁶
- (c) in certain circumstances, may work co-operatively with another Commonwealth, state or territory agency;⁷ or
- (d) may recommend an alternative dispute resolution process.⁸

In that regard, the Ombudsman acts as a dispute resolution "concierge", referring requests to other agencies and working collaboratively with them if required,⁹ the overarching purpose of the assistance function being to facilitate a quick and cost-effective resolution and to help businesses understand the dispute resolution options available to them.¹⁰

Under the assistance function, the ASBFE Ombudsman has powers of inquiry, but *only for the specific purpose of determining how to deal with the request for assistance*, and its information gathering powers are also limited to that purpose.¹¹

² Part 2 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

³ Section 65 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

⁴ Section 67(2)(b) of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

⁵ Section 68 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

⁶ Section 69 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

⁷ Section 70 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

⁸ Section 71 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

⁹ Explanatory Memorandum to the *Australian Small Business and Family Enterprise Ombudsman Bill 2015* (Cth) 60.

¹⁰ Explanatory Memorandum to the *Australian Small Business and Family Enterprise Ombudsman Bill 2015* (Cth) 60.

¹¹ Section 75 and 76 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

Importantly, the ASBFE Ombudsman must avoid duplicating the operations of any other agency of the Commonwealth, State or Territory that performs an overlapping function,¹² a principle articulated in the Second Reading speech as:

*The ombudsman will not duplicate the functions of other officials. The ombudsman will therefore work collaboratively with Commonwealth officials, such as the Commonwealth Ombudsman, and the state small business commissioners, as well as other relevant officials across all jurisdictions. As part of this collaboration, the ombudsman will identify systemic issues that warrant a national approach, and advise the government about such matters.*¹³

In order that the ASBFE Ombudsman does not duplicate the functions of the Commonwealth Ombudsman, the *Ombudsman Act 1976* (Cth) was amended by the *Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Act 2015* (Cth) (**Transitional Provisions**) to enable the Commonwealth Ombudsman to transfer complaints to the ASBFE Ombudsman if that complaint could have been made to the ASBFE Ombudsman and if that complaint could more conveniently and effectively be dealt with by the ASBFE Ombudsman.¹⁴ Under the Transitional Provisions, if a complaint is transferred to the ASBFE Ombudsman from the Commonwealth Ombudsman, that complaint is deemed to be a formal request for assistance under the Cth Act.¹⁵

In this regard, then, the ASBFE Ombudsman operates alongside, and in cooperation with, state small business commissioners, acting as a Commonwealth-wide advocate for small businesses and family enterprises.

Given the requirement that the ASBFE Ombudsman does not duplicate the functions of State agencies, it is entirely appropriate that the ASBFE Ombudsman does not have the power to investigate State Ministers in its advocacy function. In addition of course, and again this is important, it would not be appropriate for a Commonwealth body to investigate the actions of a State Minister with respect to small businesses given that those actions are informed by State policies that are tailored to meet the specific needs of the State.

Put simply therefore, it is, in my view, inappropriate to draw an analogy between the investigate powers of the ASBFE Ombudsman under its assistance function (which excludes Ministers) with the investigative powers of the WA Commissioner (which, under the Bill, does not), since the two Offices serve entirely different purposes.

5. SMALL BUSINESS DEVELOPMENT COMMISSION LEGISLATION IN OTHER JURISDICTIONS

In terms of the matter raised at section 3(b)(ii), above, I set out below, for comparative purposes, a brief discussion of the small business legislation in other jurisdictions:

(a) Small Business Commissioner Act 2013 (NSW)

Section 14(1)(b) of the *Small Business Commissioner Act 2013* (NSW) (**NSW Act**) confers power on the Small Business Commissioner (**NSW Commissioner**) to receive complaints on behalf of small business regarding their dealings with government agencies, and to

¹² Section 16 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth).

¹³ Mr Billson (Minister for Small Business), House of Representatives, Australian Small Business and Family Enterprise Ombudsman Bill 2015, Second Reading Speech, Wednesday 3 June 2015 5631-5632.

¹⁴ Schedule 1, section 6E(4) of the *Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Act 2015* (Cth).

¹⁵ Schedule 1, section 6E(5) *Australian Small Business and Family Enterprise Ombudsman (Consequential and Transitional Provisions) Act 2015* (Cth).

investigate those complaints. Section 14(2) provides that the NSW Commissioner may do that which is necessary to give effect to the powers conferred on him or her under s 14(1).

The NSW Act *does not* expressly exclude Ministers or ministerial staff from the investigative power of the NSW Commissioner.

(b) Small Business Commission Act 2017 (Vic)

Section 5 of the *Small Business Commission Act 2017 (Vic)* (**Victorian Act**) sets out the functions of the Small Business Commission, one of which is to receive and investigate complaints made by small businesses regarding unfair market practices or commercial dealings. Section 11 confers power on the Small Business Commission to investigate any matter relevant to its functions and powers. Section 21 confers on the Small Business Commissioner (**Victorian Commissioner**) the same functions and powers as the Small Business Commission.

The Victorian Act *does not* expressly exclude Ministers or ministerial staff from the investigative powers of the Victorian Commissioner.

(c) Small Business Commissioner Act 2011 (SA)

Section 5(1)(a) of the *Small Business Commissioner Act 2011 (SA)* (**SA Act**) provides that the Small Business Commissioner (**SA Commissioner**) may receive and investigate complaints by small businesses regarding their commercial dealings with other businesses. Section 5(1)(b) provides that the SA Commissioner may assist small businesses on request in their dealings with State and local government bodies.

Section 5(1)(h) provides that the SA Commissioner may:

[...] take any other action considered appropriate by the Commissioner for the purpose of [...] assisting small businesses in their dealings with State or local government bodies

Whilst Ministers and ministerial staff *are not expressly included* in the SA Commissioner's investigative powers under the SA Act, doing so may fall within the scope of s 5(1)(h) which confers broad discretion on the SA Commissioner to do that which he or she considers appropriate to assist small business in their dealings with the State.

This view is supported by the services purported to be provided by the Office of the Small Commissioner South Australia which includes:

*Receiving and investigating complaints by or on behalf of small businesses regarding their commercial dealings with other businesses. State or Local government agencies or bodies.*¹⁶


(d) Other jurisdictions

None of the other jurisdictions have statutory bodies that are equivalent to the small business commissioners discussed at 5(a)-(c).

CONCLUSION

Of the States that have legislation governing small business, none exclude Ministers or ministerial staff from the relevant small business commissioner's investigative powers.

¹⁶ Small Business Commissioner South Australia, 'Our Services and Legislation' https://www.sasbc.sa.gov.au/about_us/our_services date accessed 30 August 2019.



Accordingly, if the Bill were to contain such an exclusion then WA would be at variance with the legislative frameworks that exist in other jurisdictions.

The policy reasons that justify the exclusion of Ministers from the investigative powers of general ombudsman must be understood within the context of it being an administrative review body alongside merits review and judicial review. There is no sense in which the WA Commissioner is an administrative review body and it would be inappropriate to import the policy reasons that justify excluding Ministers from the investigative powers of the general ombudsman to justify excluding Ministers from the investigative powers of the WA Commissioner.

In addition, the policy reasons that justify the exclusion of Ministers from the investigative powers of the ASBFE ombudsman seem to grounded in the requirement that the ASBFE Ombudsman does not duplicate the functions of other agencies, including the small business commissioners and clearly cannot be used to justify excluding Ministers from the investigative power of the WA Commissioner.

Please do not hesitate to contact me should you wish to discuss this further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'N. A. Egan', with a long horizontal flourish extending to the right.

NICHOLAS EGAN
STATE SOLICITOR