

TASMANIA

OMBUDSMAN AMENDMENT BILL 2005

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OMBUDSMAN AMENDMENT BILL 2005

(Brought in by the Minister for Justice and Industrial Relations, the Honourable Judith Louise Jackson)

A BILL FOR

An Act to amend the *Ombudsman Act 1978*

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

1. Short title

This Act may be cited as the *Ombudsman Amendment Act 2005*.

2. Commencement

This Act commences on the day on which this Act receives the Royal Assent.

3. Principal Act

In this Act, the *Ombudsman Act 1978** is referred to as the Principal Act.

*No. 82 of 1978

4. Section 3 amended (Interpretation)

Section 3 of the Principal Act is amended as follows:

- (a) by inserting the following definitions after the definition of “complaint” in subsection (1):

“conciliator” means a person authorised in accordance with section 22A to act as a conciliator;

“Deputy Ombudsman” means a person appointed as Deputy Ombudsman under section 8A;

- (b) by inserting the following definition after the definition of “functions” in subsection (1):

“Government Business Enterprise” means a Government Business Enterprise within the meaning of the *Government Business Enterprises Act 1995*;

- (c) by inserting the following definition after the definition of “Head of Agency” in subsection (1):

“local authority” includes –

- (a) a single authority, controlling authority or joint authority established under Part 3 of the *Local Government Act 1993*; and

- (b) any other body or authority, constituted or established by or under an Act, having power to levy, or cause to be levied, a rate on any land;
- (d) by omitting the definition of “public authority” from subsection (1) and substituting the following definition:

“public authority” means a public authority referred to in section 4;

- (e) by inserting the following definitions after the definition of “responsible Minister” in subsection (1):

“State-owned company” means a company incorporated under the Corporations Act that is controlled by –

- (a) the Crown; or
- (b) a Government Business Enterprise; or
- (c) a statutory authority; or
- (d) another company which is itself controlled by an entity referred to in paragraph (a), (b) or (c);

“statutory authority” means a body or authority, whether incorporated or not, that is established, constituted or continued by or under an Act or

under the royal prerogative, being a body or authority which, or of which the governing authority, wholly or partly comprises a person or persons appointed by the Governor, a Minister or another statutory authority but does not include a State Service Agency;

- (f) by omitting the definition of “tribunal” from subsection (1) and substituting the following definition:

“tribunal” means a person or body of persons, which is not a court of law or a tribunal constituted or presided over by a judge of the Supreme Court, who, in arriving at the decision in question, is by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.

- (g) by inserting in subsection (2)(a) “the principal officer and” after “includes a reference to”;
- (h) by inserting in subsection (2)(b) “a principal officer and” after “includes a reference to”;
- (i) by inserting the following subsection after subsection (2):

(3) For the purpose of the definition of “State-owned company” in

subsection (1), the provisions of the Corporations Act relating to control are taken to apply as if the Crown, Government Business Enterprise or statutory authority, as the case may be, were a corporation under that Act.

5. Section 4 substituted

Section 4 of the Principal Act is repealed and the following sections are substituted:

4. Application of Act

- (1) Subject to subsection (2), the following persons, bodies and authorities are public authorities for the purposes of this Act:
 - (a) a State Service Agency;
 - (b) the Police Service;
 - (c) a local authority;
 - (d) a body or authority, whether incorporated or not, that is constituted or established by or under an Act for a public purpose;
 - (e) a body or authority, whether incorporated or not, whose members or a majority of whose members, are appointed by the Governor or a Minister;

- (f) a person appointed to an office by the Governor or a Minister under an Act;
 - (g) a Government Business Enterprise;
 - (h) a State-owned company;
 - (i) the University of Tasmania;
 - (j) any other prescribed body or authority, whether incorporated or not –
 - (i) to which any money is paid by way of appropriation from the public account; or
 - (ii) over which the Government or a Minister exercises control.
- (2) The following persons and bodies are not public authorities for the purposes of this Act:
- (a) the Director of Public Prosecutions;
 - (b) the Ombudsman;
 - (c) the Deputy Ombudsman;
 - (d) the Solicitor-General;
 - (e) the Auditor-General;
 - (f) the Tasmanian Audit Office;

- (g) an officer performing functions under the *Parliamentary Privilege Act 1898*;
- (h) a person appointed or employed under the *Governor of Tasmania Act 1982*;
- (i) a judge of the Supreme Court;
- (j) a Master of the Supreme Court;
- (k) a magistrate of the Magistrates Court;
- (l) a court.

4A. Ombudsman not to investigate certain complaints

- (1) If a person makes a complaint to the Ombudsman about an administrative action taken by a public authority, the Ombudsman may refuse to investigate that complaint if the person has not previously raised the complaint with the public authority to which the complaint relates.
- (2) If a person makes a complaint to the Ombudsman about an administrative action taken by a public authority that is also an energy entity as defined in the *Energy Ombudsman Act 1998*, the Ombudsman must refuse to investigate that complaint if the complaint can be made under that Act.

6. Section 8A inserted

After section 8 of the Principal Act, the following section is inserted in Part II:

8A. Deputy Ombudsman

- (1) The Governor may appoint a State Service officer or a State Service employee to be Deputy Ombudsman and that officer or employee is to hold that office in conjunction with State Service employment.
- (2) If the Ombudsman is unable to perform the functions of his or her office, the Deputy Ombudsman may perform all the functions of the Ombudsman.

7. Section 12 amended (Matters subject to investigation)

Section 12 of the Principal Act is amended by inserting after subsection (1) the following subsections:

- (1A) For the purpose of subsection (1), administrative action is taken on behalf of a public authority if it is taken in the exercise of the powers or in the performance of the functions of a public authority by a person under contract with, or otherwise acting under instructions from –
 - (a) the public authority; or
 - (b) the Crown.

- (1B) Subsection (1A) does not apply to administrative action taken under a contract made before the commencement of the *Ombudsman Amendment Act 2005*.

8. Section 14 amended (Complaints)

Section 14(1) of the Principal Act is amended as follows:

- (a) by inserting “or orally” after “made in writing”;
- (b) by inserting “, but the Ombudsman may require an oral complaint to be confirmed in writing” after “action”.

9. Section 17 amended (Freedom of disclosure and communication to Ombudsman)

Section 17 of the Principal Act is amended by inserting “the making of preliminary inquiries under section 20A or” after “restrict”.

10. Section 20A inserted

After section 20 of the Principal Act, the following section is inserted in Division 2:

20A. Ombudsman may make preliminary inquiries

- (1) The Ombudsman may make any preliminary inquiries that he or she considers necessary for the purpose of

ascertaining if a complaint should be investigated.

- (2) A principal officer is to provide the Ombudsman with any reasonable assistance necessary to enable the Ombudsman to make any preliminary inquiries under subsection (1).
- (3) If the Ombudsman has made preliminary inquiries under subsection (1), the Ombudsman may resolve the complaint without the complaint being investigated if, having regard to the nature and seriousness of the complaint, the Ombudsman believes the complaint may be resolved expeditiously.

11. Section 21 amended (Refusal to investigate complaints)

Section 21 of the Principal Act is amended by omitting subsection (2).

12. Section 22 amended (Notice of refusal to investigate)

Section 22(1) of the Principal Act is amended by inserting “resolves a complaint under section 20A(3)” after “entertain, a complaint,”.

13. Part III, Division 2A inserted

After section 22 of the Principal Act, the following Division is inserted in Part III:

*Division 2A – Conciliation***22A. Conciliation of complaints**

The Ombudsman, an officer of the Ombudsman or any other person with appropriate qualifications who is authorised, in writing, by the Ombudsman to act as a conciliator may attempt to resolve, by conciliation, any complaint that the Ombudsman believes may be resolved in that way.

22B. Conciliation

- (1) Participation in conciliation is voluntary and a party may withdraw from conciliation at any time.
- (2) The Ombudsman, an officer of the Ombudsman or a conciliator may terminate conciliation at any time.
- (3) The Ombudsman may regulate the procedure for conciliation in any manner he or she considers appropriate.
- (4) Conciliation is to be held in private.

22C. Unsuccessful conciliation attempt

- (1) If an attempt to deal with a complaint by conciliation is unsuccessful, the complaint is to be treated under this Part as if the attempted conciliation had not taken place.

- (2) An officer of the Ombudsman, or a conciliator, involved in an unsuccessful attempt at conciliation is excluded from participating in any further investigation of the complaint.

22D. Conciliation proceedings not admissible

- (1) Evidence of anything said, written or done during conciliation, or an attempted conciliation, or any document prepared for the purpose of conciliation is not admissible –
 - (a) in any subsequent proceedings held, or action taken, under this Act in respect of a complaint; or
 - (b) in evidence in proceedings in a court or before a person or body authorised to hear and receive evidence.
- (2) A person may consent to the admission of anything said, written or done or any document prepared for the purpose of conciliation if the thing that was said, written or done or the document that was prepared relates to that person.

22E. Cost of conciliation

The remuneration of a conciliator is to be borne by the parties to the conciliation in any proportions as the parties may agree or, failing agreement, in equal shares or

as otherwise directed by the Ombudsman.

14. Section 23 substituted

Section 23 of the Principal Act is repealed and the following sections are substituted:

23. Ombudsman to give notice of investigation

- (1) Before commencing an investigation under this Act of an administrative action taken by or on behalf of a public authority, the Ombudsman must give written notice of his or her intention to carry out the investigation –
 - (a) to the principal officer of the public authority; and
 - (b) to the complainant, if the investigation is being made as a result of a complaint.
- (2) The Ombudsman is to notify a principal officer and the responsible Minister before the Ombudsman commences an investigation of an administrative action taken by or on behalf of a public authority –
 - (a) on the Ombudsman's own motion; or
 - (b) on a reference made under section 15 or 16; or
 - (c) if section 24(1) applies.

23A. Procedure on investigation

- (1) Subject to this Act, the Ombudsman –
 - (a) may regulate the procedure in an investigation in any manner he or she considers appropriate; and
 - (b) is not required to hold a hearing for an investigation; and
 - (c) may obtain information from any persons in any manner he or she considers appropriate; and
 - (d) may make any inquiries he or she considers appropriate.
- (2) The Ombudsman may take into account in an investigation any information obtained in the course of making preliminary inquiries under section 20A.
- (3) An investigation by the Ombudsman under this Act is to be conducted in private.
- (4) The Ombudsman may determine –
 - (a) if any person may be represented, by counsel or otherwise, at an investigation; and
 - (b) if the person is allowed to be represented, the conditions or restrictions subject to which the person may be represented.
- (5) The Ombudsman is not to make a report on an investigation that contains adverse

or derogatory comments in respect of a person unless the Ombudsman has given the person an opportunity, in respect of the matter under investigation –

- (a) to appear before him or her; or
 - (b) to make representations, either orally or in writing.
- (6) The Ombudsman is not to make a report on an investigation that contains adverse or derogatory comments in respect of a public authority unless the Ombudsman has given the relevant principal officer, and the member, officer or employee of the public authority principally concerned in the taking of the administrative action to which the investigation relates, an opportunity –
- (a) to appear before him or her; or
 - (b) to make representations, either orally or in writing.
- (7) If, during or after an investigation, the Ombudsman is of the opinion that there is evidence of a breach of duty or misconduct on the part of any member, officer or employee of a public authority, and that, in all the circumstances, the evidence is of sufficient force to justify his or her doing so, the Ombudsman is to bring the evidence –
- (a) if the member, officer or employee is the principal officer of the public authority, to the

notice of the responsible Minister; and

- (b) in any other case, to the notice of the principal officer of the public authority.
- (8) The Ombudsman may, either before or after the completion of an investigation, discuss any matter that is relevant to the investigation with a Minister concerned with that matter.

15. Part III, Division 3A: Heading inserted

Part III of the Principal Act is amended by inserting the following heading after section 25:

Division 3A – Secrecy and obstruction of Ombudsman

16. Section 26 amended (Secrecy, &c.)

Section 26 of the Principal Act is amended as follows:

- (a) by omitting from subsection (1) “or an officer of the Ombudsman” and substituting “, an officer of the Ombudsman or a conciliator”;
- (b) by omitting from subsection (5) “or an officer of the Ombudsman” and substituting “, an officer of the Ombudsman or a conciliator”;
- (c) by omitting from subsection (5) “or such an officer” and substituting “, officer of the Ombudsman or conciliator”;

- (d) by omitting from subsection (6) “or an officer of the Ombudsman” and substituting “, an officer of the Ombudsman or a conciliator”.

17. Section 27 amended (Obstruction of Ombudsman, &c.)

Section 27 of the Principal Act is amended as follows:

- (a) by omitting from paragraph (a) “or any officer of the Ombudsman,” and substituting “an officer of the Ombudsman or a conciliator”;
- (b) by omitting from paragraph (b) “or an officer of the Ombudsman” and substituting “, an officer of the Ombudsman or a conciliator”;
- (c) by omitting from paragraph (c) “or an officer of the Ombudsman” and substituting “, an officer of the Ombudsman or a conciliator”.

18. Section 28 amended (Procedure on completion of investigation)

Section 28 of the Principal Act is amended as follows:

- (a) by inserting in subsection (1) “subsection (1A) or” after “specified in”;
- (b) by inserting the following subsection after subsection (1):

- (1A) In a case referred to in subsection (1), the Ombudsman may resolve a matter informally with the relevant principal officer.
- (c) by inserting in subsection (3) “and the responsible Minister has been notified of the investigation under section 23(2)” after “subsection (2)”;
- (d) by inserting in subsection (5) “and the responsible Minister” after “Premier”.

19. Section 33 amended (Protection of Ombudsman and officers)

Section 33 of the Principal Act is amended as follows:

- (a) by omitting from subsection (1) “Neither the Ombudsman nor any officer of the Ombudsman shall be liable,” and substituting “The Ombudsman, an officer of the Ombudsman or a conciliator is not liable,”;
- (b) by omitting from subsection (2) “or any officer of the Ombudsman” and substituting “, an officer of the Ombudsman or a conciliator”.

20. Section 33A inserted

After section 33 of the Principal Act, the following section is inserted in Part IV:

33A. Exemption from *Freedom of Information Act 1991*

The *Freedom of Information Act 1991* does not apply to information, as defined in that Act, in the possession of the Ombudsman or an officer of the Ombudsman if the information relates to a complaint, preliminary inquiries, an investigation, conciliation, report or recommendation made under this or any other Act.

21. Schedule 1 repealed

Schedule 1 to the Principal Act is repealed.

22. Schedule 2 amended (Excluded Administrative Action)

Schedule 2 to the Principal Act is amended by inserting after item 5 the following items:

6. Action taken by a tribunal or a member of a tribunal in the performance of the tribunal's decision making or determination making functions.
7. Action taken by the Tasmanian Electoral Commission established under the *Electoral Act 2004* or the Electoral Commissioner appointed under that Act that may be the subject of any proceedings in the Supreme Court –
 - (a) under the *Electoral Act 2004*; or

- (b) under the *Local Government Act 1993* in respect of a dispute about the result of an election.