



Australian Small Business and Family Enterprise Ombudsman Act 2015

No. 123, 2015

**An Act to establish the Australian Small Business
and Family Enterprise Ombudsman, and for
related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Australian Small Business and Family Enterprise Ombudsman Act 2015

No. 123, 2015

An Act to establish the Australian Small Business and Family Enterprise Ombudsman, and for related purposes

[Assented to 10 September 2015]

The Parliament of Australia enacts:

No. 123, 2015 Australian Small Business and Family Enterprise Ombudsman Act 1
2015

Part 1—Preliminary

1 Short title

This Act may be cited as the *Australian Small Business and Family Enterprise Ombudsman Act 2015*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	10 September 2015
2. Sections 3 to 96	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	10 March 2016

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Simplified outline of this Act

There is to be an Australian Small Business and Family Enterprise Ombudsman.

The Ombudsman has an advocacy function and an assistance function.

Under the advocacy function, the Ombudsman:

- undertakes research and inquiries into legislation, policies and practices affecting small businesses and family enterprises;
- 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;
- promotes best practice in dealing with small businesses and family enterprises.

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. The Ombudsman 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. 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.

The assistance requested may relate to a dispute with another entity. In that case, the Ombudsman may recommend that an

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alternative dispute resolution 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 alternative dispute resolution providers, to assist small businesses and family enterprises in accessing alternative dispute resolution.

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 Definitions

In this Act:

action has a meaning affected by section 7.

advocacy function: see sections 13 and 14.

agency: see section 8.

alternative dispute resolution processes means procedures and services for the resolution of disputes, and includes:

- (a) conferencing; and
- (b) mediation; and
- (c) neutral evaluation; and
- (d) case appraisal; and
- (e) conciliation; and
- (f) prescribed procedures or services;

but does not include:

- (g) arbitration; or
- (h) court procedures or services.

Paragraphs (b) to (f) of this definition do not limit paragraph (a) of this definition.

assistance function: see sections 13 and 15.

Australia, when used in a geographical sense, includes the external Territories.

confidential: see section 9.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

enterprise includes a business, activity, project, undertaking or arrangement.

family enterprise: see section 6.

formal request: see subsection 66(5).

Ombudsman means the Australian Small Business and Family Enterprise Ombudsman.

paid work means work for financial gain or reward (whether as an employee, a self-employed person or otherwise).

person assisting small business/family enterprise: see section 81.

prescribed means prescribed by legislative instrument under section 96.

protected information: see section 80.

quarter means a period of 3 months starting on 1 January, 1 April, 1 July or 1 October.

relevant action: see section 65.

relevant legislation, policies and practices: see section 35.

small business: see section 5.

5 Meaning of *small business*

- (1) A business is a **small business** at a particular time in a financial year (the **current year**) if:
 - (a) it has fewer than 100 employees at that time; or

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- (b) either:
 - (i) its revenue for the previous financial year is \$5,000,000 or less; or
 - (ii) if there was no time in the previous financial year when the business was carried on—its revenue for the current year is \$5,000,000 or less.
- (2) For the purposes of this section, business includes an enterprise, activity, project, undertaking or arrangement.
- (3) In counting employees for the purposes of the definition of *small business* in subsection (1), take part-time employees into account as an appropriate fraction of a full-time equivalent.
- (4) Revenue is to be calculated for the purposes of this section in accordance with accounting standards in force at the relevant time.

6 Meaning of *family enterprise*

A small business operated as a family enterprise is a *family enterprise* for the purposes of this Act.

7 Meaning of *action*

A reference to the taking of *action* includes a reference to:

- (a) an activity or series of activities; and
- (b) a project, development or undertaking; and
- (c) making a decision or recommendation; and
- (d) formulating a proposal; and
- (e) requiring that communications with an entity be in a particular manner or form; and
- (f) an alteration of any of the things, including decisions, proposals and requirements, mentioned in paragraphs (a) to (e); and
- (g) failure or refusal to do any of the things mentioned in paragraphs (a) to (f).

8 Meaning of *agency* of the Commonwealth, a State or a Territory

- (1) A body is an ***agency*** of the Commonwealth if the body is one of the following:
- (a) a Department of State of the Commonwealth;
 - (b) an agency, authority or body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth;
 - (c) a person holding office, or exercising power, under a law of the Commonwealth;
 - (d) a body (whether incorporated or not) prescribed for the purposes of this paragraph.
- (2) A body is an ***agency*** of a State or a Territory if the body is one of the following:
- (a) a Department of State of the State or the Territory;
 - (b) a local government body of the State or the Territory;
 - (c) any other agency, authority or body (whether incorporated or not) established for a public purpose by or under a law of the State or the Territory;
 - (d) a person holding office, or exercising power, under a law of the State or the Territory;
 - (e) a body (whether incorporated or not) prescribed for the purposes of this paragraph.

9 Meaning of *confidential* information

- (1) Information is ***confidential*** for the purposes of a provision of this Act requiring or permitting a person (the ***decision-maker***) to table the information, publish the information or otherwise make the information publicly available if:
- (a) the decision-maker is satisfied that the disclosure of the information in that way would cause undue distress or embarrassment to a person; or
 - (b) the decision-maker is satisfied in accordance with subsection (2) that the information is commercial-in-confidence; or

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- (c) the decision-maker is satisfied that disclosure of the information in that way would be contrary to the public interest.
- (2) The decision-maker may be satisfied that information is commercial-in-confidence if a person demonstrates to the decision-maker that:
 - (a) the disclosure of the information could unreasonably affect the person, or a business or action related to the person, in an adverse manner; and
 - (b) the information is not in the public domain; and
 - (c) the information is not required to be disclosed under another law of the Commonwealth, a State or a Territory; and
 - (d) the information is not readily discoverable.

10 Act binds the Crown

This Act binds the Crown in each of its capacities. However, this Act does not make the Crown liable to be prosecuted for an offence.

11 Extension to Territories

This Act extends to every external Territory.

Note: External Territories include Norfolk Island, the Territory of Cocos (Keeling) Islands and the Territory of Christmas Island.

Part 2—Australian Small Business and Family Enterprise Ombudsman

Division 1—Establishment and functions and powers of the Australian Small Business and Family Enterprise Ombudsman

12 Establishment

There is to be an Australian Small Business and Family Enterprise Ombudsman.

13 Functions of the Ombudsman

The functions of the Ombudsman are:

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

14 The advocacy function

The following functions are included in the *advocacy function*:

- (a) to identify the concerns of those operating small businesses and family enterprises arising out of relevant legislation, policies and practices;
- (b) to conduct research and make inquiries on the Ombudsman's own initiative in relation to relevant legislation, policies and practices under Division 2 of Part 3;
- (c) to inquire into matters referred to the Ombudsman by the Minister under Division 3 of Part 3;

Part 2 Australian Small Business and Family Enterprise Ombudsman

Division 1 Establishment and functions and powers of the Australian Small Business and Family Enterprise Ombudsman

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- (d) to provide advice to the Minister on matters referred to the Ombudsman under Division 4 of Part 3;
- (e) to work co-operatively, as far as is possible, with the appropriate agencies of the Commonwealth, States and Territories to develop national strategies in relation to legislation, policies and practices that affect, or may affect, small businesses or family enterprises under Division 5 of Part 3;
- (f) to provide information to, make submissions or recommendations to, and otherwise contribute to the conduct of inquiries into relevant legislation, policies and practices under Division 6 of Part 3;
- (g) to review proposals in relation to relevant legislation, policies and practices, and give the Minister advice in relation to proposals of that kind, under Division 6 of Part 3;
- (h) to promote best practice in interactions with small businesses and family enterprises under Division 6 of Part 3.

15 The assistance function

The following functions are included in the *assistance function*:

- (a) to respond under Division 2 of Part 4 to requests for assistance in relation to relevant actions, including by referring requests to another agency of the Commonwealth, a State or a Territory or by working co-operatively with another agency of the Commonwealth, a State or a Territory to give assistance;
- (b) where a request for assistance relates to a dispute in relation to a relevant action, to make recommendations under Division 3 of Part 4 about how the dispute may be managed, including recommendations that an alternative dispute resolution process be used to manage the dispute.

16 General policy guidelines

In performing the Ombudsman's functions, the Ombudsman must:

- (a) perform the Ombudsman's functions in the most convenient and effective way possible; and
- (b) avoid duplicating the operations of any other agency of the Commonwealth, a State or a Territory that performs a function that wholly or partly overlaps with a function of the Ombudsman; and
- (c) work co-operatively, as far as is possible, with other agencies of the Commonwealth, the States and the Territories to perform the Ombudsman's functions; and
- (d) comply with all other laws of the Commonwealth.

17 Flexibility and range of working methods in performance of the Ombudsman's functions

- (1) The Ombudsman is not required to act in a formal manner in the performance of the Ombudsman's functions, unless otherwise required to do so under this Act, or any other Act or legislative instrument.
- (2) In the performance of the Ombudsman's functions, the Ombudsman may:
 - (a) inform himself or herself on any matter in any way the Ombudsman thinks fit; and
 - (b) consult with anyone the Ombudsman thinks fit; and
 - (c) receive written or oral information or submissions.

18 Ombudsman's powers

The Ombudsman has power to do all things necessary or convenient to be done for or in connection with the performance of the Ombudsman's functions.

Note: The Secretary may enter into contracts and other arrangements on behalf of the Commonwealth to assist the Ombudsman in performing the Ombudsman's functions. See section 23 of the *Public Governance, Performance and Accountability Act 2013*.

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19 Delegation by the Ombudsman

- (1) The Ombudsman may, by written instrument, delegate the functions and powers of the Ombudsman to:
 - (a) an SES employee, or acting SES employee, in the Department; or
 - (b) an APS employee who holds or performs the duties of an Executive Level 1 or 2 position, or an equivalent position, in the Department.
- (2) In exercising powers or performing functions under a delegation, the delegate must comply with any written directions by the Ombudsman.

20 Directions from the Minister

- (1) The Minister may, by legislative instrument, give written directions to the Ombudsman about the performance of the Ombudsman's functions.

Note: Section 42 (disallowance) and Part 6 (sunsetting) of the *Legislative Instruments Act 2003* do not apply to the direction (see sections 44 and 54 of that Act).

- (2) The direction must be of a general nature only.
- (3) The Ombudsman must comply with the direction.

21 Minister may require reports

- (1) The Minister may, in writing, direct the Ombudsman to give the Minister specified reports relating to the Ombudsman's functions.
- (2) The Ombudsman must comply with the direction.
- (3) The direction, or the report (if made in writing), is not a legislative instrument.

22 Ombudsman is an official for the purposes of the finance law

The Ombudsman is an *official* of the Department for the purposes of the finance law (as defined for the purposes of the *Public Governance, Performance and Accountability Act 2013*).

Note: The Ombudsman's responsibilities as an official under the *Public Governance, Performance and Accountability Act 2013* include duties in relation to exercising due care and diligence, acting in good faith and for a proper purpose, not improperly using information or position and disclosing material interests (see Division 3 of Part 2-2 of that Act).

23 Annual report

The annual report prepared by the Department and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* for a period must include:

- (a) the number and title of reports tabled by the Minister under section 56 or published by the Minister under section 40A during the period; and
- (b) the kinds of national strategies in relation to legislation, policies and practices that affect, or may affect, small businesses or family enterprises developed during the period; and
- (c) the number and subject matter of inquiries to which the Ombudsman has made submissions, recommendations or other contributions during the period; and
- (d) the number of proposals in relation to relevant legislation, policies and practices that the Ombudsman has reviewed during the period; and
- (e) the kinds of action taken to promote best practice during the period; and
- (f) the number of visits to the Ombudsman's website during the period; and
- (g) the number of requests for assistance made to the Ombudsman; and

Part 2 Australian Small Business and Family Enterprise Ombudsman

Division 1 Establishment and functions and powers of the Australian Small Business and Family Enterprise Ombudsman

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- (h) the number of requests for assistance that resulted in one of the following for the period, broken down for each of the following:
 - (i) a formal request for assistance;
 - (ii) a recommendation by the Ombudsman that parties to a dispute take part in an alternative dispute resolution process;
 - (iii) the resolution of a dispute;
 - (iv) the resolution of a dispute through an alternative dispute resolution process recommended by the Ombudsman; and
- (i) the number and kind of requests for assistance transferred to other agencies of the Commonwealth during the period; and
- (j) the number and kind of requests for assistance transferred to agencies of the States and Territories during the period; and
- (k) the number and kind of requests for assistance that the Ombudsman resolved co-operatively with other agencies of the Commonwealth, the States and the Territories during the period; and
- (l) the number and kind of requests for assistance in relation to which the Ombudsman recommended an alternative dispute resolution process.

Division 2—Appointment and terms and conditions of the Australian Small Business and Family Enterprise Ombudsman

24 Appointment

- (1) The Australian Small Business and Family Enterprise Ombudsman is to be appointed by the Governor-General by written instrument.
- (2) Before the Governor-General appoints a person as the Australian Small Business and Family Enterprise Ombudsman, the Minister must be satisfied that the person:
 - (a) has suitable qualifications or experience; and
 - (b) is of good character.
- (3) The Ombudsman holds office on a full-time basis.
- (4) The Ombudsman holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

Note: The Ombudsman may be reappointed: see section 33AA of the *Acts Interpretation Act 1901*.

25 Remuneration

- (1) The Ombudsman is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Ombudsman is to be paid the remuneration that is prescribed under subsection (4).
- (2) The Ombudsman is to be paid the allowances that are prescribed under subsection (4).
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.
- (4) The Minister may, by legislative instrument, prescribe:
 - (a) remuneration for the purposes of subsection (1); and
 - (b) allowances for the purposes of subsection (2).

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26 Leave of absence

- (1) The Ombudsman has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant to the Ombudsman leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

27 Outside work

The Ombudsman must not engage in any paid work outside the duties of the Ombudsman's office without the Minister's approval.

28 Resignation

- (1) The Ombudsman may resign his or her appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

29 Disclosure of interests

Disclosure before appointment

- (1) Before starting to hold office, the Ombudsman must give to the Minister a written statement of any material personal interest that the Ombudsman has that relates to the functions of the Ombudsman.

Note: The Ombudsman, once appointed, must also disclose interests under section 29 of the *Public Governance, Performance and Accountability Act 2013*.

Disclosure after appointment

- (2) A disclosure by the Ombudsman under section 29 of the *Public Governance, Performance and Accountability Act 2013* (which

deals with the duty to disclose interests) must be made to the Minister.

- (3) Subsection (2) applies in addition to any rules made for the purposes of that section.
- (4) For the purposes of this Act and the *Public Governance, Performance and Accountability Act 2013*, the Ombudsman is taken not to have complied with section 29 of that Act if the Ombudsman does not comply with subsection (2) of this section.

30 Termination of appointment

- (1) The Minister may terminate the appointment of the Ombudsman:
 - (a) for misbehaviour; or
 - (b) if the Ombudsman is unable to perform the duties of his or her office because of physical or mental incapacity.
- (2) The Minister may terminate the appointment of the Ombudsman if:
 - (a) the Ombudsman:
 - (i) becomes bankrupt; or
 - (ii) takes steps to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with one or more of his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of one or more of his or her creditors; or
 - (b) the Ombudsman is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) the Ombudsman engages, except with the Minister's approval, in paid work outside the duties of his or her office (see section 27); or
 - (d) the Ombudsman fails, without reasonable excuse, to comply with section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section.

Part 2 Australian Small Business and Family Enterprise Ombudsman

Division 2 Appointment and terms and conditions of the Australian Small Business and Family Enterprise Ombudsman

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31 Other terms and conditions

The Ombudsman holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

32 Acting appointments

The Minister may, by written instrument, appoint a person to act as the Australian Small Business and Family Enterprise Ombudsman:

- (a) during a vacancy in the office (whether or not an appointment has previously been made to the office); or
- (b) during any period, or during all periods, when the Ombudsman:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

Division 3—Persons assisting the Australian Small Business and Family Enterprise Ombudsman

33 Staff

The staff necessary to assist the Ombudsman are to be persons engaged under the *Public Service Act 1999* and made available for the purpose by the Secretary of the Department.

34 Consultants

The Secretary may, on behalf of the Commonwealth, engage consultants to assist in the performance of the Ombudsman's functions.

Part 3—Advocating for small businesses and family enterprises

Division 1—Preliminary

35 Constitutional connection—meaning of *relevant legislation, policies and practices*

The following are *relevant legislation, policies and practices*:

- (a) past, present or proposed legislation, policies or practices of Commonwealth agencies, to the extent that they affect or may affect small businesses or family enterprises;
- (b) 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;
- (c) past, present or proposed policies or practices of constitutional corporations, to the extent that they affect or may affect small businesses or family enterprises;
- (d) past, present or proposed policies or practices of small businesses or family enterprises that are constituted as, or operated by, a constitutional corporation;
- (e) 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:
 - (i) between Australia and places outside Australia; or
 - (ii) among the States; or
 - (iii) within a Territory, between a State and a Territory or between 2 Territories;
- (f) past, present or proposed policies or practices of any entity in relation to one or more of the following:
 - (i) insurance;
 - (ii) banking;
 - (iii) telecommunications;

- (iv) copyright, patents, designs or trade marks;
to the extent that those policies or practices also affect, or
may affect, small businesses or family enterprises;
- (g) past, present or proposed policies or practices of any entity,
to the extent that they affect or may affect small businesses or
family enterprises:
 - (i) that are operated by an individual or individuals resident
in a Territory; or
 - (ii) that are, or are operated by, a body corporate or body
corporates, the principal place of business of which is in
a Territory; or
 - (iii) that are located in a Territory.

Division 2—Research and inquiries on Ombudsman's own initiative

36 Research and inquiries

The Ombudsman may, on the Ombudsman's own initiative, conduct research or make inquiries into:

- (a) the effect of relevant legislation, policies and practices on small businesses or family enterprises, or a class of small businesses or family enterprises; and
- (b) ways in which relevant legislation, policies and practices might be improved to assist small businesses or family enterprises, or a class of small businesses or family enterprises.

37 Notice to person to provide information and documents

- (1) If the Ombudsman reasonably believes that a person has, or could take reasonable steps to obtain, information or documents relevant to research or an inquiry under this Division, the Ombudsman may, by notice, require the person to send to the Ombudsman:
 - (a) a statement setting out the specified information; and
 - (b) specified documents.
- (2) The notice must:
 - (a) be in writing; and
 - (b) specify the period within which the statement and documents referred to in subsection (1) must be sent to the Ombudsman; and
 - (c) be served on the person.
- (3) The period specified in the notice must be a period of at least 10 business days commencing on the day the notice is served.
- (4) A person who is served a notice under this section must comply with the notice.

Penalty: 30 penalty units.

- (5) A person is not subject to a requirement under subsection (4) if:
- (a) the person does not have the information or document required; and
 - (b) the person has taken all reasonable steps available to the person to obtain the information or document required and has been unable to obtain it.

38 Documents produced in relation to research or inquiry

If documents are produced or given to the Ombudsman under this Division, the Ombudsman:

- (a) may take possession of, and make copies of, or take extracts from, the documents; and
- (b) may keep possession of the documents for so long as is necessary for the purposes of the research or inquiry to which they relate; and
- (c) while the Ombudsman has possession of the documents, must permit them to be inspected at all reasonable times by people who would be entitled to inspect them if they were not in the possession of the Ombudsman.

39 Limitation on powers

Nothing in this Division allows a power to be exercised to the extent that it would impair the capacity of a State to exercise its constitutional powers.

40 Reports to the Minister

- (1) The Ombudsman must give the Minister a report in relation to each quarter that:
- (a) outlines the research conducted and inquiries made during the quarter; and
 - (b) if the Ombudsman reasonably believes that relevant legislation, policies and practices have had, are having or are reasonably likely to have an adverse effect on small

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businesses or family enterprises—outlines that fact and the reasons for the Ombudsman's conclusion.

- (2) The report must be given within 20 business days after the end of the quarter.
- (3) The Ombudsman may at any time give the Minister a report in relation to research conducted or inquiries made into any relevant legislation, policies and practices.
- (4) A report given to the Minister under this section may include recommendations by the Ombudsman in relation to any matter included in the report.

41 Minister may publish Ombudsman's report

- (1) The Minister may publish a report, or any part of a report, given to the Minister under section 40 in any way he or she thinks fit.
- (2) If the publication of information or a recommendation contained in the report, or the part of the report, would be likely to adversely affect the interests of any person, the Minister must, before publishing the report, or the part of the report, direct the Ombudsman:
 - (a) to notify the person that the information or recommendation is contained in the report, or the part of the report; and
 - (b) to give the person a reasonable period (not exceeding 30 days) to make representations, either orally or in writing, in relation to the information or recommendation, and its publication.
- (3) Before publishing the report, or the part of the report, the Minister:
 - (a) may delete any information or recommendation from the report, or the part of the report, if:
 - (i) the information or recommendation would be likely to adversely affect the interests of any person; and
 - (ii) the Minister reasonably believes that it is in the public interest to delete the information or recommendation; and

- (b) must delete from the report, or the part of the report, any confidential information.
- (4) In making a decision under subparagraph (3)(a)(ii), the Minister must take into account any representations made by the person in response to a notification under subsection (2).
- (5) A direction under subsection (2) (if made in writing) is not a legislative instrument.

Division 3—Minister may refer matter to Ombudsman for inquiry

Subdivision A—Referral by Minister

42 Minister may refer a matter for inquiry

- (1) The Minister may refer the following matters to the Ombudsman for inquiry:
 - (a) the effect of relevant legislation, policies and practices on small businesses or family enterprises, or a class of small businesses or family enterprises;
 - (b) ways in which relevant legislation, policies and practices might be improved to assist small businesses or family enterprises, or a class of small businesses or family enterprises.
- (2) In referring a matter to the Ombudsman for inquiry, the Minister may, for the purpose of ensuring that the inquiry is conducted in the manner appropriate to that inquiry, do any or all of the following:
 - (a) require the Ombudsman to hold hearings for the purposes of the inquiry;
 - (b) specify a period within which the Ombudsman must submit the Ombudsman's report on the inquiry to the Minister;
 - (c) require the Ombudsman to make a draft report available to the public during an inquiry;
 - (d) require the Ombudsman to make recommendations in relation to the matter.
- (3) The Ombudsman must comply with a requirement imposed by the Minister under subsection (2).
- (4) The Minister may withdraw or amend the reference at any time before the Minister has received the report on the inquiry from the Ombudsman.

- (5) If the Minister refers a matter to the Ombudsman for inquiry, the Ombudsman may also make recommendations in the report on any matters relevant to the matter referred.

Subdivision B—Notice of inquiry

43 Notice of inquiry

As soon as practicable after the Ombudsman receives a reference to hold an inquiry, the Ombudsman must give reasonable notice in each State and Territory, by advertisement published in a newspaper circulating in the State or Territory, of the intention to hold the inquiry.

Subdivision C—Hearings

44 Application of this Subdivision

This Subdivision applies if the Ombudsman is required under section 42 to hold hearings for the purposes of an inquiry.

45 Notice of hearings

- (1) Before the Ombudsman begins to hold hearings, the Ombudsman must give reasonable notice in each State and Territory of the intention to hold the hearings, the subject of the hearings and the time and place at which the first of the hearings is to begin.
- (2) The notice must be given by advertisement published in a newspaper circulating in each State and Territory.

46 Procedure at hearings

- (1) A hearing must be held in public except in the circumstances set out in subsection (2).
- (2) If the Ombudsman reasonably believes that it is in the public interest not to hold the hearing, or a part of it, in public the Ombudsman may:

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- (a) direct that the hearing, or that part of it, take place in private; and
- (b) give directions as to who may be present.

47 Notice to person to provide information and documents

- (1) If the Ombudsman reasonably believes that a person has, or could take reasonable steps to obtain, information or documents relevant to the inquiry, the Ombudsman may, by notice, require the person to send to the Ombudsman:
 - (a) a statement setting out the specified information; and
 - (b) specified documents.
- (2) The notice must:
 - (a) be in writing; and
 - (b) specify the period within which the statement and documents referred to in subsection (1) must be sent to the Ombudsman; and
 - (c) be served on the person.
- (3) The period specified in the notice must be a period of at least 10 business days commencing on the day the notice is served.
- (4) A person who is served a notice under this section must comply with the notice.

Penalty: 30 penalty units.
- (5) A person is not subject to a requirement under subsection (4) if:
 - (a) the person does not have the information or document required; and
 - (b) the person has taken all reasonable steps available to the person to obtain the information or document required and has been unable to obtain it.

48 Summons to person to attend hearing

- (1) If the Ombudsman reasonably believes that a person has, or could take reasonable steps to obtain, information or documents relevant
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to the inquiry, the Ombudsman may summon a person, in writing, to appear at a hearing to give evidence and to produce documents specified in the summons.

- (2) A person served with a summons to appear at a hearing must not:
- (a) fail to attend as required by the summons; or
 - (b) fail to attend from day to day.

Penalty: 30 penalty units.

- (3) Paragraph (2)(b) does not apply if the person is excused, or released from further attendance, by the Ombudsman.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

49 Refusal to answer questions or produce documents

- (1) A person appearing as a witness at a hearing must not refuse or fail:
- (a) to answer a question as required by the Ombudsman; or
 - (b) to produce a document as required by a summons served on the person under section 48.

Penalty: 30 penalty units.

- (2) A person is not subject to a requirement under subsection (1) if:
- (a) the person does not have the information or document required; and
 - (b) the person has taken all reasonable steps available to the person to obtain the information or document required and has been unable to obtain it.

50 Documents produced in relation to inquiry

If documents are produced or given to the Ombudsman under this Subdivision, the Ombudsman:

- (a) may take possession of, and make copies of, or take extracts from, the documents; and

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- (b) may keep possession of the documents for so long as is necessary for the purposes of the inquiry to which they relate; and
- (c) while the Ombudsman has possession of the documents, must permit them to be inspected at all reasonable times by people who would be entitled to inspect them if they were not in the possession of the Ombudsman.

51 Allowances to witnesses

A person who attends a hearing under a summons served under section 48 is entitled to be paid by the Commonwealth such allowances and expenses as are prescribed.

52 Restrictions on publication of evidence

- (1) If the Ombudsman directs that a hearing, or a part of it, take place in private, the Ombudsman may give directions prohibiting or restricting the publication of:
 - (a) evidence given before the hearing (including evidence given prior to a direction that part of the hearing take place in private); or
 - (b) matters contained in documents given to the Ombudsman in connection with the hearing.
- (2) A person must not contravene a direction given under this section.
Penalty: 30 penalty units.

53 Written statements etc. to be made public

- (1) The Ombudsman must make available to the public the contents of:
 - (a) any written evidence given to the Ombudsman in connection with the inquiry; and
 - (b) any document produced to the Ombudsman in connection with the inquiry.

- (2) However, the Ombudsman must delete any confidential information from the evidence or document before making it publicly available.
- (3) The Ombudsman may make the evidence or document publicly available in any way the Ombudsman thinks fit.

54 Limitation on powers

Nothing in this Subdivision allows a power to be exercised to the extent that it would impair the capacity of a State to exercise its constitutional powers.

Subdivision D—Report of inquiry

55 Ombudsman must prepare a report on the inquiry

If the Minister refers a matter to the Ombudsman for inquiry, the Ombudsman must make a written report to the Minister on the inquiry, unless the Minister withdraws the reference to the Ombudsman.

56 Report of inquiry to be tabled

- (1) The Minister must cause a copy of the Ombudsman's report on an inquiry to be tabled in each House of the Parliament:
 - (a) within 25 sitting days of that House after the day on which the Minister receives it; or
 - (b) if the Ombudsman recommends that the tabling of the report, or part of the report, be delayed for a specified period—within 25 sitting days of that House after the end of that period.
- (2) If the publication of information or an opinion in the report would be likely to adversely affect the interests of any person, the Minister must, before tabling the report, direct the Ombudsman:
 - (a) to notify the person that the information or opinion is contained in the report; and

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- (b) to give the person a reasonable period (not exceeding 30 days) to make representations, either orally or in writing, in relation to the information or opinion, and its publication.
- (3) Before tabling the report on an inquiry, the Minister:
 - (a) may delete any information or opinion from the report if:
 - (i) the information or opinion would be likely to adversely affect the interests of any person; and
 - (ii) the Minister reasonably believes that it is in the public interest to delete the information or opinion; and
 - (b) must delete from the report any confidential information.
- (4) In making a decision under subparagraph (3)(a)(ii), the Minister must take into account any representations made by the person in response to a notification under subsection (2).
- (5) A direction under subsection (2) (if made in writing) is not a legislative instrument.

Division 4—Providing advice to the Minister

57 Minister may refer a matter for advice

- (1) The Minister may refer the following matters to the Ombudsman for advice:
 - (a) the effect of relevant legislation, policies and practices on small businesses or family enterprises, or a class of small businesses or family enterprises;
 - (b) ways in which relevant legislation, policies and practices might be improved to assist small businesses or family enterprises, or a class of small businesses or family enterprises.
- (2) If the Minister refers a matter to the Ombudsman for advice, the Minister may specify any or all of the following:
 - (a) that the advice is to be in writing;
 - (b) a period within which the advice is to be given;
 - (c) any matter to which the Ombudsman is to have regard in giving the advice.
- (3) The Ombudsman must comply with a requirement imposed by the Minister under subsection (2).
- (4) The Minister may withdraw or amend the referral at any time before the Ombudsman gives the advice.
- (5) If the Minister refers a matter to the Ombudsman for advice, the Ombudsman may also advise the Minister on any matters the Ombudsman considers relevant to the matter.

58 Minister may publish Ombudsman's advice

- (1) The Minister may publish advice given by the Ombudsman under section 57 in any way he or she thinks fit.
- (2) If the publication of information or an opinion in the advice would be likely to adversely affect the interests of any person, the

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Minister must, before publishing the advice, direct the Ombudsman:

- (a) to notify the person that the information or opinion is contained in the advice; and
 - (b) to give the person a reasonable period (not exceeding 30 days) to make representations, either orally or in writing, in relation to the information or opinion, and its publication.
- (3) Before publishing the advice, the Minister:
- (a) may delete any information or opinion from the advice if:
 - (i) the information or opinion would be likely to adversely affect the interests of any person; and
 - (ii) the Minister reasonably believes that it is in the public interest to delete the information or opinion; and
 - (b) must delete from the advice any confidential information.
- (4) In making a decision under subparagraph (3)(a)(ii), the Minister must take into account any representations made by the person in response to a notification under subsection (2).
- (5) A direction under subsection (2) (if made in writing) is not a legislative instrument.

Division 5—National strategies

59 Working co-operatively with Commonwealth, State and Territory agencies

The Ombudsman must work co-operatively, as far as is possible, with the appropriate agencies of the Commonwealth, States and Territories for the purpose of developing national strategies in relation to legislation, policies and practices that affect, or may affect, small businesses or family enterprises.

60 Secretariat services and research services

The Ombudsman may provide secretariat services or research services to joint Commonwealth, State and Territory bodies formed for the purpose of developing national strategies in relation to legislation, policies and practices that affect, or may affect, small businesses or family enterprises.

Division 6—Other advocacy functions

61 Contributing to inquiries into relevant legislation, policies and practices

The Ombudsman may provide information to, make submissions or recommendations to, and otherwise contribute to the conduct of inquiries into relevant legislation, policies and practices.

62 Reviewing proposals relating to relevant legislation, policies and practices

Ombudsman may review on own initiative

- (1) The Ombudsman may review a proposal for relevant legislation, policies and practices, or to change relevant legislation, policies and practices, to determine:
 - (a) the effect on small businesses and family enterprises if the proposal is carried out; and
 - (b) ways in which the proposal might be improved to assist small businesses and family enterprises.

Minister may refer to Ombudsman for review

- (2) The Minister may refer a proposal for relevant legislation, policies and practices, or to change relevant legislation, policies and practices, to the Ombudsman for review.
- (3) If the Minister refers a proposal to the Ombudsman for review:
 - (a) the Ombudsman must review the proposal to determine:
 - (i) the effect on small businesses and family enterprises if the proposal is carried out; and
 - (ii) ways in which the proposal might be improved to assist small businesses and family enterprises; and
 - (b) the Ombudsman must give the Minister advice on the proposal, based on the review.

- (4) The Minister may specify any or all of the following:
 - (a) that the advice is to be in writing;
 - (b) a period within which the review is to be carried out and the advice is to be given;
 - (c) any matter to which the Ombudsman is to have regard in carrying out the review or giving the advice.
- (5) The Ombudsman must comply with a requirement imposed by the Minister under subsection (4).
- (6) The Minister may withdraw or amend the referral at any time before the Ombudsman gives the advice.

63 Minister may publish advice given as a result of a review

- (1) The Minister may publish advice given by the Ombudsman under section 62 in any way he or she thinks fit.
- (2) If the publication of information or an opinion in the advice would be likely to adversely affect the interests of any person, the Minister must, before publishing the advice, direct the Ombudsman:
 - (a) to notify the person that the information or opinion is contained in the report; and
 - (b) to give the person a reasonable period (not exceeding 30 days) to make representations, either orally or in writing, in relation to the information or opinion, and its publication.
- (3) Before publishing the advice, the Minister:
 - (a) may delete any information or opinion from the advice if:
 - (i) the information or opinion would be likely to adversely affect the interests of any person; and
 - (ii) the Minister reasonably believes that it is in the public interest to delete the information or opinion; and
 - (b) must delete from the advice any confidential information.
- (4) In making a decision under subparagraph (3)(a)(ii), the Minister must take into account any representations made by the person in response to a notification under subsection (2).

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- (5) A direction under subsection (2) (if made in writing) is not a legislative instrument.

64 Promoting best practice

The Ombudsman may, on the Ombudsman's own initiative, take steps to promote best practice in interactions:

- (a) between:
 - (i) Commonwealth agencies; and
 - (ii) small businesses or family enterprises; and
- (b) between:
 - (i) Territory agencies; and
 - (ii) small businesses or family enterprises; and
- (c) between:
 - (i) constitutional corporations; and
 - (ii) small businesses or family enterprises; and
- (d) between:
 - (i) constitutional corporations that are small businesses or family enterprises; and
 - (ii) other entities; and
- (e) between entities, in the course of trade and commerce:
 - (i) between Australia and places outside Australia; or
 - (ii) among the States; or
 - (iii) within a Territory; or
 - (iv) between a State and a Territory or between 2 Territories; and
- (f) between:
 - (i) small businesses or family enterprises that are operated by individuals who are resident in a Territory; and
 - (ii) other entities; and
- (g) between:
 - (i) small businesses or family enterprises that are, or are operated by, body corporates the principal place of business of which is in a Territory; and
 - (ii) other entities; and

- (h) between:
- (i) small businesses or family enterprises that are operated within a Territory; and
 - (ii) other entities.

Part 4—Assisting a small business or family enterprise

Division 1—Preliminary

65 Constitutional connection—meaning of *relevant action*

Each of the following is a *relevant action*:

- (a) action by an agency of the Commonwealth that affects, or may affect, a small business or family enterprise;
- (b) action by a constitutional corporation that affects, or may affect, a small business or family enterprise;
- (c) action by any entity that affects a small business or family enterprise that is a constitutional corporation;
- (d) action by any entity that affects, or may affect, a small business or family enterprise in the course of trade or commerce:
 - (i) between Australia and places outside Australia; or
 - (ii) among the States; or
 - (iii) within a Territory, between a State and a Territory or between 2 Territories;
- (e) action in relation to one or more of the following:
 - (i) insurance;
 - (ii) banking;
 - (iii) telecommunications;
 - (iv) copyright, patents, designs or trade marks;where that action is by, affects or may affect a small business or family enterprise;
- (f) an action by or that affects or may affect a small business or family enterprise:
 - (i) that is operated by an individual or individuals resident in a Territory; or

- (ii) that is, or is operated by, a body corporate or body corporates, the principal place of business of which is in a Territory; or
- (iii) that is located in a Territory.

Division 2—Responding to requests for assistance

66 Requests for assistance

- (1) Any person may request assistance from the Ombudsman in relation to a relevant action.
- (2) The request may be made to the Ombudsman orally or in writing.
- (3) If the request is made orally to the Ombudsman, the Ombudsman may:
 - (a) reduce the request to writing; or
 - (b) at any time require the person who made the request to reduce the request to writing.
- (4) If the Ombudsman requires a person to reduce a request for assistance to writing, the Ombudsman may decline to deal with the request, or to deal with the request further, until the person reduces the request to writing.
- (5) A request for assistance in relation to a relevant action made to the Ombudsman in writing, or reduced to writing, is a *formal request*.

67 Circumstances in which Ombudsman authorised to deal with a request for assistance

- (1) The Ombudsman is authorised to deal with a request for assistance in relation to a relevant action.
- (2) However, the Ombudsman is not authorised to deal with a request for assistance in relation to a relevant action if any of the following apply:
 - (a) the request for assistance does not relate to a relevant action;
 - (b) the action is taken by a Minister of the Commonwealth, or of a State or a Territory;
 - (c) the action is taken by an agency of a State or a Territory;

- (d) the action is an order, direction or decision by a judge, justice or magistrate of a court created by the Parliament or of a court of a State or Territory or a member of a tribunal;
 - (e) the action is taken by an officer of such a court or a tribunal exercising powers of the court or tribunal;
 - (f) the action is taken as part of:
 - (i) proceedings of, or the proceedings of a committee of, a Parliament; or
 - (ii) proceedings of a commission or inquiry under a law of the Commonwealth, or of a State or a Territory;
 - (g) the action consists of enforcement of a judgment or order of a court or tribunal.
- (3) If a formal request for assistance is made and the Ombudsman decides not to give assistance, or further assistance, because the Ombudsman is not authorised to deal with the request for assistance, the Ombudsman must give the person who requested assistance notice in writing setting out:
- (a) the Ombudsman's decision; and
 - (b) the reasons for the Ombudsman's decision.

68 Circumstances in which Ombudsman may decide not to provide assistance

- (1) The Ombudsman may decide not to give assistance in response to a request, or decide not to give further assistance in response to a request, if:
- (a) the Ombudsman reasonably believes that the person who requested assistance became aware of the action more than 12 months before the request was made; or
 - (b) the Ombudsman reasonably believes that:
 - (i) the request is frivolous or vexatious; or
 - (ii) the request was not made in good faith; or
 - (iii) the person who made the request does not have a sufficient interest in the subject matter of the request; or
 - (iv) providing assistance in response to the request is not warranted having regard to all the circumstances; or

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- (c) the Ombudsman is required to transfer the request under section 69.
- (2) If a formal request for assistance is made and the Ombudsman decides not to give assistance, or further assistance, under this section, the Ombudsman must give the person who requested assistance notice in writing setting out:
 - (a) the Ombudsman's decision; and
 - (b) the reasons for the Ombudsman's decision.

69 Circumstances in which the Ombudsman must transfer a request for assistance to another agency

- (1) The Ombudsman must not give assistance in response to a request for assistance in relation to a relevant action, or give further assistance in response to such a request, if:
 - (a) the Ombudsman reasonably believes that:
 - (i) the request could have been made to another agency of the Commonwealth, a State or a Territory; and
 - (ii) the request could be more conveniently or effectively dealt with by the other agency; and
 - (b) the other agency has the legal power to deal with the request.
- (2) The Ombudsman must not give assistance in relation to an aspect of a request for assistance in relation to a relevant action, or give further assistance in relation to an aspect of such a request, if:
 - (a) the Ombudsman reasonably believes that:
 - (i) that aspect of the request for assistance could have been made to another agency of the Commonwealth, a State or a Territory; and
 - (ii) that aspect of the request for assistance could be more conveniently or effectively dealt with by the other agency; and
 - (b) the other agency has the legal power to deal with that aspect of the request.
- (3) The Ombudsman must not make a decision under subsection (1) or (2) unless:

- (a) the Ombudsman has consulted with the other agency about whether it would be more convenient or effective for the other agency to deal with the request, or the relevant aspect of the request; or
 - (b) the Ombudsman has consulted with the other agency about whether it would be more convenient or effective for the other agency to deal with a particular class of requests, or a particular class of aspects of requests, and the request or aspect of the request is one of that class.
- (4) If the Ombudsman makes a decision not to give assistance, or further assistance, under subsection (1) or (2), the Ombudsman must transfer the request, or the relevant aspect of the request, to the other agency.
- (5) The Ombudsman must:
- (a) transfer the request, or the relevant aspect of the request, as soon as is reasonably practicable; and
 - (b) give the other agency any information or documents relating to the request, or the relevant aspect of the request, that are in the possession, or under the control, of the Ombudsman; and
 - (c) as soon as is reasonably practicable give the person who made the request notice that the request, or the relevant aspect of the request, has been transferred to the other agency.
- (6) If the request is a formal request, the notice under paragraph (5)(c) must be in writing.
- (7) If a request for assistance, or an aspect of a request for assistance, is transferred to another agency under this section:
- (a) the request for assistance, or that aspect of the request for assistance, is taken to have been made to the other agency under the law of the Commonwealth, State or Territory under which the other agency has power to deal with the request, or the aspect of the request (however described under that law); and

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- (b) paragraph (a) applies, despite any requirement under that law that the request or that aspect of the request be made to the other agency in a particular manner or form.

70 Circumstances in which the Ombudsman may work co-operatively with another agency to give assistance

- (1) The Ombudsman may enter into an arrangement with another agency of the Commonwealth, a State or a Territory, to work co-operatively with the other agency:
 - (a) to deal with a request for assistance in relation to a relevant action; and
 - (b) to deal with a class of requests for assistance in relation to relevant actions.
- (2) The Ombudsman may only enter into an arrangement with another agency under subsection (1), if:
 - (a) the Ombudsman reasonably believes that:
 - (i) a request for assistance to which the arrangement relates, or an aspect of a request for assistance to which the arrangement relates, could have been made to the other agency; and
 - (ii) the other agency is willing to work co-operatively with the Ombudsman to give assistance; and
 - (iii) assistance could be more conveniently or effectively given if the Ombudsman worked co-operatively with that agency; and
 - (b) under the law of the Commonwealth or of a State or a Territory, the other agency has the power to deal with a request to which the arrangement relates, or an aspect of a request for assistance to which the arrangement relates.
- (3) If the Ombudsman receives a request for assistance in relation to which the Ombudsman has entered into an arrangement under subsection (1), or that is of a class in relation to which the Ombudsman has entered into an arrangement under subsection (1), the Ombudsman must:

- (a) if, under the arrangement, any aspect of the request for assistance is to be transferred to the other agency—transfer that aspect of the request as soon as is reasonably practicable; and
 - (b) give the other agency any information or documents:
 - (i) that relate to the request and are relevant to the aspect of the request to be dealt with by the agency; and
 - (ii) that are in the possession, or under the control, of the Ombudsman; and
 - (c) as soon as is reasonably practicable give the person who made the request notice that the Ombudsman will work co-operatively, as far as is possible, with the other agency to deal with the request.
- (4) If the request is a formal request, the notice under paragraph (3)(c) must be in writing.
- (5) If an aspect of a request for assistance is transferred to another agency under this section:
- (a) that aspect of the request for assistance is taken to have been made to the other agency under the law of the Commonwealth, State or Territory under which the other agency has power to deal with the aspect of the request (however described under that law); and
 - (b) paragraph (a) applies, despite any requirement under that law that the aspect of the request be made to the other agency in a particular manner or form.

Division 3—Assistance in a dispute

71 Ombudsman may recommend alternative dispute resolution process

- (1) If a person requests the Ombudsman to give assistance in a dispute in relation to a relevant action, the Ombudsman may make recommendations on how the dispute may be managed.
- (2) Without limiting subsection (1):
 - (a) the Ombudsman may recommend that the parties to the dispute should take part in an alternative dispute resolution process, or alternative dispute resolution processes, of the kind specified in the recommendation; and
 - (b) the Ombudsman may recommend that the alternative dispute resolution process or processes be conducted by one or more of a group of persons specified in the recommendation who are drawn from the list of alternative dispute resolution providers published by the Ombudsman under section 72.
- (3) The Ombudsman must not recommend a group of alternative dispute resolution providers under paragraph (2)(b), unless the Ombudsman reasonably believes that, having regard to the following matters, those providers are best suited to assist the parties in the dispute:
 - (a) the qualifications and experience of the providers;
 - (b) the convenience of the parties in accessing assistance by the providers;
 - (c) the cost to the parties in accessing assistance by the providers.
- (4) If the Ombudsman recommends an alternative dispute resolution process or alternative dispute resolution processes, the Ombudsman must give notice, in writing, of the recommendation to the parties to the dispute.
- (5) The notice must include a warning that if:

- (a) the parties do not undertake an alternative dispute resolution process, or alternative dispute resolution processes, of the kind specified in the recommendation; or
 - (b) withdraw from an alternative dispute resolution process, or alternative dispute resolution processes, of the kind specified in the recommendation;
- the Ombudsman may publicise that fact.

72 List of alternative dispute resolution providers

- (1) The Ombudsman may publish a list of persons who:
 - (a) have the qualifications or experience to conduct alternative dispute resolution processes to resolve disputes in relation to relevant actions; and
 - (b) the rates that providers on the list have agreed to charge in conducting alternative dispute resolution processes to resolve disputes in relation to relevant actions.
- (2) The Minister may, by legislative instrument, prescribe:
 - (a) the qualifications or experience required for persons to be included on the list; and
 - (b) rules to ensure that alternative dispute resolution processes offered by persons included on the list are available in a way that is convenient and effective for the parties to disputes in relation to relevant actions.

73 Alternative dispute resolution processes not to be conducted by the Ombudsman

- (1) An alternative dispute resolution process recommended by the Ombudsman is to be conducted by a person, other than a person mentioned in subsection (2), chosen by the parties to the dispute.
- (2) An alternative dispute resolution process recommended by the Ombudsman must not be conducted by:
 - (a) the Ombudsman; or
 - (b) a delegate of the Ombudsman; or
 - (c) a person assisting the Ombudsman under section 33; or

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(d) a person engaged as a consultant under section 34.

74 Publishing failure to participate in alternative dispute resolution process

- (1) The Ombudsman may publicise, in any way that the Ombudsman thinks appropriate, either or both of the following:
- (a) that an entity who is a party to a dispute in relation to a relevant action has refused to engage in an alternative dispute resolution process, or alternative dispute resolution processes, of the kind recommended by the Ombudsman under paragraph 71(2)(a);
 - (b) that an entity who is a party to a dispute in relation to a relevant action has withdrawn from an alternative dispute resolution process, or alternative dispute resolution processes, of the kind recommended by the Ombudsman under paragraph 71(2)(a).
- (2) This section does not:
- (a) limit the power of the Ombudsman or anyone else to publicise a matter or a person's name; or
 - (b) prevent anyone else from publicising a matter or a person's name; or
 - (c) affect any obligation (however imposed) on anyone else to publicise a matter or a person's name.

Division 4—Gathering information about requests for assistance

75 Inquiries in relation to a request for assistance

The Ombudsman may make inquiries for one or more of the following purposes:

- (a) deciding whether a request for assistance is one which the Ombudsman is authorised to deal with;
- (b) deciding whether to refuse a request for assistance;
- (c) deciding whether a request for assistance, or an aspect of a request for assistance, could be more conveniently or effectively dealt with by another agency of the Commonwealth, a State or a Territory;
- (d) deciding whether a request for assistance, or an aspect of a request for assistance, could be more conveniently or effectively dealt with by working co-operatively with another agency of the Commonwealth, a State or a Territory;
- (e) deciding whether to recommend an alternative dispute resolution process, or alternative dispute resolution processes, to assist in a dispute in relation to a relevant action, and which process or processes to recommend;
- (f) obtaining details of the parties to a dispute in relation to a relevant action for the purposes of performing functions or duties, or exercising powers, under this Act in relation to the dispute;
- (g) deciding what other action the Ombudsman will take in giving assistance in response to a request.

76 Notice to person to provide information and documents

- (1) If the Ombudsman reasonably believes that a person has, or could take reasonable steps to obtain, information or documents relevant to an inquiry under this Division, the Ombudsman may, by notice, require the person to send to the Ombudsman:
 - (a) a statement setting out the specified information; and

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- (b) specified documents.
- (2) The notice must:
 - (a) be in writing; and
 - (b) specify the period within which the statement and documents referred to in subsection (1) must be sent to the Ombudsman; and
 - (c) be served on the person.
- (3) The period specified in the notice must be a period of at least 10 business days commencing on the day the notice is served.
- (4) A person who is served a notice under this section must comply with the notice.

Penalty: 30 penalty units.
- (5) A person is not subject to a requirement under subsection (4) if:
 - (a) the person does not have the information or document required; and
 - (b) the person has taken all reasonable steps available to the person to obtain the information or document required and has been unable to obtain it.

77 Documents produced in relation to inquiry

If documents are produced or given to the Ombudsman under this Division, the Ombudsman:

- (a) may take possession of, and make copies of, or take extracts from, the documents; and
- (b) may keep possession of the documents for so long as is necessary for the purposes of the inquiry to which they relate; and
- (c) while the Ombudsman has possession of the documents, must permit them to be inspected at all reasonable times by people who would be entitled to inspect them if they were not in the possession of the Ombudsman.

78 Limitation on powers

Nothing in this Division allows a power to be exercised to the extent that it would impair the capacity of a State to exercise its constitutional powers.

Part 5 General requirements

Division 1 Concurrent operation of State Law

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Part 5—General requirements

Division 1—Concurrent operation of State Law

79 Concurrent operation of State law

This Act is not intended to exclude or limit the operation of any State or Territory law, to the extent that the State or Territory law is capable of operating concurrently with this Act.

Note: Under the general policy guidelines set out in section 16, the Ombudsman must avoid duplicating the operations of other agencies of the Commonwealth, States and Territories and must work co-operatively with those agencies.

Division 2—Secrecy**80 Meaning of *protected information***

Protected information is information that:

- (a) is disclosed to, or obtained by, a person in his or her capacity as a person assisting small business/family enterprise; and
- (b) relates to the affairs of a person (other than a person assisting small business/family enterprise).

81 Meaning of *person assisting small business/family enterprise*

Each of the following is a *person assisting small business/family enterprise*:

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

82 Use or disclosure of protected information

- (1) A person commits an offence if:
 - (a) protected information has been disclosed to, or obtained by, the person; and
 - (b) the protected information has been disclosed to, or obtained by, the person in his or her capacity as a person assisting small business/family enterprise; and
 - (c) the person:
 - (i) discloses the information to another person; or
 - (ii) uses the information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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Exceptions

- (2) Each of the following is an exception to the prohibition in subsection (1):
- (a) the disclosure or use is authorised by a provision of this Act or a legislative instrument under this Act;
 - (b) the disclosure or use is in compliance with a requirement under:
 - (i) a law of the Commonwealth; or
 - (ii) a law of a State or a Territory.
- Note: A defendant bears an evidential burden in relation to a matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).
- (3) Except where it is necessary to do so for the purposes of giving effect to this Act or a legislative instrument under this Act, a person assisting small business/family enterprise is not to be required:
- (a) to produce to a court or tribunal a document containing protected information; or
 - (b) to disclose protected information to a court or tribunal.

83 Disclosure or use for the purposes of this Act

A person assisting small business/family enterprise may disclose or use protected information if the disclosure or use is for the purposes of this Act or a legislative instrument under this Act.

84 Disclosure to the Minister

- (1) Any of the following persons:
- (a) the Ombudsman;
 - (b) a delegate of the Ombudsman;
 - (c) a person assisting the Ombudsman under section 33;
- may disclose protected information to the Minister.
- (2) However, information must not be disclosed to the Minister under this section if it relates to a request for assistance in relation to a dispute with the Department.

85 Disclosure to the Secretary etc.

- (1) Any of the following persons:
 - (a) the Ombudsman;
 - (b) a delegate of the Ombudsman;
 - (c) a person assisting the Ombudsman under section 33;may disclose protected information to:
 - (d) the Secretary; or
 - (e) an officer of the Department who is authorised by the Secretary, in writing, for the purposes of this section;if the disclosure is for the purposes of advising the Minister.
- (2) However, information must not be disclosed under this section to the Secretary or a person mentioned in paragraph (1)(e), if it relates to a request for assistance in relation to a dispute with the Department.

86 Disclosure to certain agencies, bodies and persons

When this section applies

- (1) This section applies if the Ombudsman reasonably believes that protected information will enable or assist any of the following agencies or bodies to perform or exercise any of the functions or powers of the agency or body:
 - (a) the Commonwealth Ombudsman;
 - (b) an agency of a State or a Territory the functions of which include a function that corresponds to a function of the Ombudsman;
 - (c) the Australian Securities and Investments Commission;
 - (d) the Australian Competition Tribunal;
 - (e) the National Competition Council;
 - (f) the Australian Competition and Consumer Commission;
 - (g) any other prescribed agency of the Commonwealth, a State or a Territory;
 - (h) any professional disciplinary body prescribed.

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Disclosure

- (2) The Ombudsman may disclose that protected information to the person or body concerned.
- (3) If any of the following persons:
 - (a) a delegate of the Ombudsman;
 - (b) a person assisting the Ombudsman under section 33;is authorised by the Ombudsman, in writing, for the purposes of this section, the person may disclose that protected information to the person or body concerned.

Offence—unauthorised disclosure by professional disciplinary bodies

- (4) A person commits an offence if:
 - (a) the person is:
 - (i) a professional disciplinary body prescribed for the purpose of paragraph (1)(h); or
 - (ii) a member of such a professional disciplinary body; and
 - (b) protected information has been disclosed under subsection (2) or (3) to the body; and
 - (c) the person:
 - (i) discloses the information to another person; or
 - (ii) uses the information; and
 - (d) the disclosure or use is not:
 - (i) with the consent of the Ombudsman; or
 - (ii) for the purpose of deciding whether or not to take disciplinary or other action; or
 - (iii) for the purpose of taking disciplinary or other action.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

87 Disclosure with consent

A person assisting small business/family enterprise may disclose or use protected information that relates to the affairs of a person if:

- (a) the person has consented to the disclosure or use; and
- (b) the disclosure or use is in accordance with that consent.

88 Disclosure to reduce threat to life or health

A person assisting small business/family enterprise may disclose or use protected information if:

- (a) the person assisting small business/family enterprise reasonably believes that the disclosure or use is necessary to prevent or lessen a serious and imminent threat to the life or health of an individual; and
- (b) the disclosure or use is for the purposes of preventing or lessening that threat.

89 Disclosure of publicly available information

A person assisting small business/family enterprise may disclose or use protected information if it is already publicly available.

90 Disclosure of summaries or statistics

A person assisting small business/family enterprise may disclose or use:

- (a) summaries of protected information; or
- (b) statistics derived from protected information;

if those summaries or statistics, as the case may be, are not likely to enable the identification of a person.

91 Disclosure for purposes of law enforcement and national security

Scope

- (1) This section applies if the Ombudsman reasonably believes that the disclosure of protected information is reasonably necessary for:
 - (a) the enforcement of the criminal law; or
 - (b) the enforcement of a law imposing a pecuniary penalty; or
 - (c) the protection of the public revenue; or

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(d) the protection of national security.

Disclosure

- (2) The Ombudsman may disclose that protected information to:
- (a) an agency of the Commonwealth, a State or a Territory; or
 - (b) an Australian police force;
- whose functions include that enforcement or protection, for the purposes of that enforcement or protection.
- (3) If a delegate of the Ombudsman, or a person assisting the Ombudsman under section 33, is authorised by the Ombudsman, in writing, for the purposes of this section, the individual may disclose that protected information to:
- (a) an agency of the Commonwealth, a State or a Territory; or
 - (b) an Australian police force;
- whose functions include that enforcement or protection, for the purposes of that enforcement or protection.

Secondary disclosure and use

- (4) A person commits an offence if:
- (a) the person is, or has been, an employee or officer of:
 - (i) an agency of the Commonwealth, a State or a Territory; or
 - (ii) an Australian police force; and
 - (b) protected information has been disclosed under subsection (2) or (3) to the agency or police force, as the case may be; and
 - (c) the person has obtained the information in the person's capacity as an employee or officer of the agency or police force, as the case may be; and
 - (d) the person:
 - (i) discloses the information to another person; or
 - (ii) uses the information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

- (5) Subsection (4) does not apply if:
- (a) the disclosure or use is with the consent of the Ombudsman;
and
 - (b) the disclosure or use is for the purpose of:
 - (i) enforcing the criminal law; or
 - (ii) enforcing a law imposing a pecuniary penalty; or
 - (iii) protecting the public revenue; or
 - (iv) protecting national security.

Note: A defendant bears an evidential burden in relation to a matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

Conditions

- (6) The Ombudsman may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (2) or (3).
- (7) A person commits an offence if:
- (a) the person is subject to a condition under subsection (6); and
 - (b) the person engages in conduct; and
 - (c) the person's conduct breaches the condition.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

- (8) An instrument under subsection (6) is not a legislative instrument.

Division 3—Review of decisions

92 Review by the Administrative Appeals Tribunal

An application may be made to the Administrative Appeals Tribunal for a review of any of the following decisions:

- (a) a decision under paragraph 9(1)(a), (b) or (c) that information is not to be treated as confidential information;
- (b) a decision under subparagraph 41(3)(a)(ii), 56(3)(a)(ii), 58(3)(a)(ii) or 63(3)(a)(ii) 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;
- (c) a decision under subsection 74(1) to publicise that a party to a dispute has refused to engage in, or has withdrawn from, an alternative dispute resolution process.

Division 4—Other matters**93 Privileges not abrogated***Self-incrimination*

- (1) Nothing in this Act affects the right of a person to refuse to give information or produce a document on the ground that the information or the production of the document might tend to incriminate the person or make the person liable to a penalty.

Legal professional privilege

- (2) Nothing in this Act affects the right of a person to refuse to give information or produce a document on the ground that:
 - (a) the information would be privileged from being given on the ground of legal professional privilege; or
 - (b) the document would be privileged from being produced on the ground of legal professional privilege.

Other legislation not affected

- (3) The fact that this section is included in this Act does not imply that the privilege against self-incrimination or legal professional privilege is abrogated in any other Act.

94 Provisions of other Acts in relation to information and documents

Nothing in this Act affects 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.

95 Review of assistance function

- (1) The Minister must cause a review of the Ombudsman's assistance function to be conducted at intervals determined under this section.

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- (2) Without limiting the matters to be covered by the review, the review must consider the following matters:
 - (a) the kinds of assistance requested during the period being reviewed;
 - (b) whether the assistance given was convenient and effective for the operators of small businesses and family enterprises who requested assistance;
 - (c) whether amendment of this Act is needed to more conveniently and effectively assist the operators of small businesses and family enterprises.
- (3) The Minister must not appoint a person to conduct the review, unless the Minister is reasonably satisfied that:
 - (a) the person is suitably qualified to conduct the review; and
 - (b) the person has sufficient independence from the Ombudsman, the Minister and the Department to conduct the review impartially.
- (4) The first review must be completed, and a written report given to the Minister, by a date determined by the Minister that is not later than 30 June 2017.
- (5) Each later review must be completed, and a written report given to the Minister, by a date determined by the Minister that is not more than 4 years after the date on which the report of the last review was given to the Minister.
- (6) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days after receiving it.

96 Legislative instrument

The Minister may, by legislative instrument, make rules prescribing matters:

- (a) required or permitted by this Act to be prescribed by the rules; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

*[Minister's second reading speech made in—
House of Representatives on 3 June 2015
Senate on 17 June 2015]*

(85/15)

No. 123, 2015

*Australian Small Business and Family Enterprise Ombudsman Act
2015*

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