

EXPOSURE DRAFT

2013-2014-2015

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

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| EXPOSURE DRAFT (11/03/2015) |
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Australian Small Business and Family Enterprise Ombudsman Bill 2015

No. , 2015

(Treasury)

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

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A Bill for an Act to establish the Australian Small Business and Family Enterprise Ombudsman, and for related purposes

The Parliament of Australia enacts:

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. | |
| 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, | |

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Part 1 Preliminary

Section 3

Commencement information

Column 1**Column 2****Column 3**

Provisions**Commencement****Date/Details**

they commence on the day after the end of that period.

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

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

7 **3 Simplified outline of this Act**

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

10 The Ombudsman has an advocacy function and an assistance
11 function.

12 Under the advocacy function, the Ombudsman:

- 13 • undertakes research and inquiries into legislation, policies and
14 practices affecting small businesses and family enterprises;
- 15 • reports and gives advice to the Minister on those matters;
- 16 • contributes to inquiries by others into those matters;
- 17 • contributes to developing national strategies on those matters;
- 18 • reviews proposals relating to those matters and advises the
19 Minister on them;
- 20 • promotes best practice in dealing with small businesses and
21 family enterprises.

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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 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.

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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:

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Part 1 Preliminary

Section 4

- 1 (a) conferencing; and
2 (b) mediation; and
3 (c) neutral evaluation; and
4 (d) case appraisal; and
5 (e) conciliation; and
6 (f) prescribed procedures or services;
7 but does not include:
8 (g) arbitration; or
9 (h) court procedures or services.
10 Paragraphs (b) to (f) of this definition do not limit paragraph (a) of
11 this definition.
- 12 ***assistance function***: see sections 13 and 15.
- 13 ***Australia***, when used in a geographical sense, includes the external
14 Territories.
- 15 ***confidential***: see section 9.
- 16 ***constitutional corporation*** means a corporation to which
17 paragraph 51(xx) of the Constitution applies.
- 18 ***enterprise*** includes a business, activity, project, undertaking or
19 arrangement.
- 20 ***family enterprise***: see section 6.
- 21 ***formal request***: see subsection 66(5).
- 22 ***Ombudsman*** means the Australian Small Business and Family
23 Enterprise Ombudsman.
- 24 ***paid work*** means work for financial gain or reward (whether as an
25 employee, a self-employed person or otherwise).
- 26 ***person assisting small business/family enterprise***: see section 81.
- 27 ***prescribed*** means prescribed by legislative instrument under
28 section 96.

1 *protected information*: see section 80.

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

4 *relevant action*: see section 65.

5 *relevant legislation, policies and practices*: see section 35.

6 *small business*: see section 5.

7 **5 Meaning of *small business***

8 (1) A business is a *small business* at a particular time in a financial
9 year (the *current year*) if:

10 (a) it has fewer than 100 employees at that time; or

11 (b) either:

12 (i) its revenue for the previous financial year is \$5,000,000
13 or less; or

14 (ii) if there was no time in the previous financial year when
15 the business was carried on—its revenue for the current
16 year is \$5,000,000 or less.

17 (2) For the purposes of this section, business includes an enterprise,
18 activity, project, undertaking or arrangement.

19 (3) In counting employees for the purposes of the definition of *small*
20 *business* in subsection (1), take part-time employees into account
21 as an appropriate fraction of a full-time equivalent.

22 (4) Revenue is to be calculated for the purposes of this section in
23 accordance with accounting standards in force at the relevant time.

24 **6 Meaning of *family enterprise***

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

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Part 1 Preliminary

Section 7

1 **7 Meaning of *action***

- 2 A reference to the taking of *action* includes a reference to:
- 3 (a) an activity or series of activities; and
- 4 (b) a project, development or undertaking; and
- 5 (c) making a decision or recommendation; and
- 6 (d) formulating a proposal; and
- 7 (e) requiring that communications with an entity be in a
- 8 particular manner or form; and
- 9 (f) an alteration of any of the things, including decisions,
- 10 proposals and requirements, mentioned in paragraphs (a) to
- 11 (e); and
- 12 (g) failure or refusal to do any of the things mentioned in
- 13 paragraphs (a) to (f).

14 **8 Meaning of *agency* of the Commonwealth, a State or a Territory**

- 15 (1) A body is an *agency* of the Commonwealth if the body is one of
- 16 the following:
- 17 (a) a Department of State of the Commonwealth;
- 18 (b) an agency, authority or body (whether incorporated or not)
- 19 established for a public purpose by or under a law of the
- 20 Commonwealth;
- 21 (c) a person holding office, or exercising power, under a law of
- 22 the Commonwealth.
- 23 (2) A body is an *agency* of a State or a Territory if the body is one of
- 24 the following:
- 25 (a) a Department of State of the State or the Territory;
- 26 (b) a local government body of the State or the Territory;
- 27 (c) any other agency, authority or body (whether incorporated or
- 28 not) established for a public purpose by or under a law of the
- 29 State or the Territory;
- 30 (d) a person holding office, or exercising power, under a law of
- 31 the State or the Territory.

1 **9 Meaning of *confidential* information**

2 (1) Information is *confidential* for the purposes of a provision of this
3 Act requiring or permitting a person (the *decision-maker*) to table
4 the information, publish the information or otherwise make the
5 information publicly available if:

6 (a) the decision-maker is satisfied that the disclosure of the
7 information in that way would cause undue distress or
8 embarrassment to a person; or

9 (b) the decision-maker is satisfied in accordance with
10 subsection (2) that the information is
11 commercial-in-confidence; or

12 (c) the decision-maker is satisfied that disclosure of the
13 information in that way would be contrary to the public
14 interest.

15 (2) The decision-maker may be satisfied that information is
16 commercial-in-confidence if a person demonstrates to the
17 decision-maker that:

18 (a) the disclosure of the information could unreasonably affect
19 the person, or a business or action related to the person, in an
20 adverse manner; and

21 (b) the information is not in the public domain; and

22 (c) the information is not required to be disclosed under another
23 law of the Commonwealth, a State or a Territory; and

24 (d) the information is not readily discoverable.

25 **10 Act binds the Crown**

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

29 **11 Extension to Territories**

30 This Act extends to every external Territory.

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Part 1 Preliminary

Section 11

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

8 *Australian Small Business and Family Enterprise Ombudsman Bill* No. , 2015
2015

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1 **Part 2—Australian Small Business and Family**
2 **Enterprise Ombudsman**

3 **Division 1—Establishment and functions and powers of the**
4 **Australian Small Business and Family Enterprise**
5 **Ombudsman**

6 **12 Establishment**

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

9 **13 Functions of the Ombudsman**

10 The functions of the Ombudsman are:

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

18 **14 The advocacy function**

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

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

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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

Section 15

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

18 **15 The assistance function**

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

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

31 **16 General policy guidelines**

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

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

11 **17 Flexibility and range of working methods in performance of the**
12 **Ombudsman's functions**

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

23 **18 Ombudsman's powers**

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

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

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1 **22 Ombudsman is an official for the purposes of the finance law**

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

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

11 **23 Annual report**

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

- 15 (a) the number and title of reports tabled by the Minister under
16 section 56 or published by the Minister under section 40A
17 during the period; and
18 (b) the kinds of national strategies in relation to legislation,
19 policies and practices that affect, or may affect, small
20 businesses or family enterprises developed during the period;
21 and
22 (c) the number and subject matter of inquiries to which the
23 Ombudsman has made submissions, recommendations or
24 other contributions during the period; and
25 (d) the number of proposals in relation to relevant legislation,
26 policies and practices that the Ombudsman has reviewed
27 during the period; and
28 (e) the kinds of action taken to promote best practice during the
29 period; and
30 (f) the number of visits to the Ombudsman's website during the
31 period; and
32 (g) the number of requests for assistance made to the
33 Ombudsman; and

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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

Section 23

- 1 (h) the number of requests for assistance that resulted in one of
2 the following for the period, broken down for each of the
3 following:
4 (i) a formal request for assistance;
5 (ii) a recommendation by the Ombudsman that parties to a
6 dispute take part in an alternative dispute resolution
7 process;
8 (iii) the resolution of a dispute;
9 (iv) the resolution of a dispute through an alternative dispute
10 resolution process recommended by the Ombudsman;
11 and
12 (i) the number and kind of requests for assistance transferred to
13 other agencies of the Commonwealth during the period; and
14 (j) the number and kind of requests for assistance transferred to
15 agencies of the States and Territories during the period; and
16 (k) the number and kind of requests for assistance that the
17 Ombudsman resolved co-operatively with other agencies of
18 the Commonwealth, the States and the Territories during the
19 period; and
20 (l) the number and kind of requests for assistance in relation to
21 which the Ombudsman recommended an alternative dispute
22 resolution process.

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

4 **24 Appointment**

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

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

17 **25 Remuneration**

- 18 (1) The Ombudsman is to be paid the remuneration that is determined
19 by the Remuneration Tribunal. If no determination of that
20 remuneration by the Tribunal is in operation, the Ombudsman is to
21 be paid the remuneration that is prescribed under subsection (4).
- 22 (2) The Ombudsman is to be paid the allowances that are prescribed
23 under subsection (4).
- 24 (3) This section has effect subject to the *Remuneration Tribunal Act*
25 *1973*.
- 26 (4) The Minister may, by legislative instrument, prescribe:
27 (a) remuneration for the purposes of subsection (1); and

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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

Section 26

1 (b) allowances for the purposes of subsection (2).

2 **26 Leave of absence**

3 (1) The Ombudsman has the recreation leave entitlements that are
4 determined by the Remuneration Tribunal.

5 (2) The Minister may grant to the Ombudsman leave of absence, other
6 than recreation leave, on the terms and conditions as to
7 remuneration or otherwise that the Minister determines.

8 **27 Outside work**

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

11 **28 Resignation**

12 (1) The Ombudsman may resign his or her appointment by giving the
13 Minister a written resignation.

14 (2) The resignation takes effect on the day it is received by the
15 Minister or, if a later day is specified in the resignation, on that
16 later day.

17 **29 Disclosure of interests**

18 *Disclosure before appointment*

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

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

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1 *Disclosure after appointment*

- 2 (2) A disclosure by the Ombudsman under section 29 of the *Public*
3 *Governance, Performance and Accountability Act 2013* (which
4 deals with the duty to disclose interests) must be made to the
5 Minister.
- 6 (3) Subsection (2) applies in addition to any rules made for the
7 purposes of that section.
- 8 (4) For the purposes of this Act and the *Public Governance,*
9 *Performance and Accountability Act 2013*, the Ombudsman is
10 taken not to have complied with section 29 of that Act if the
11 Ombudsman does not comply with subsection (2) of this section.

12 **30 Termination of appointment**

- 13 (1) The Minister may terminate the appointment of the Ombudsman:
14 (a) for misbehaviour; or
15 (b) if the Ombudsman is unable to perform the duties of his or
16 her office because of physical or mental incapacity.
- 17 (2) The Minister may terminate the appointment of the Ombudsman if:
18 (a) the Ombudsman:
19 (i) becomes bankrupt; or
20 (ii) takes steps to take the benefit of any law for the relief of
21 bankrupt or insolvent debtors; or
22 (iii) compounds with one or more of his or her creditors; or
23 (iv) makes an assignment of his or her remuneration for the
24 benefit of one or more of his or her creditors; or
25 (b) the Ombudsman is absent, except on leave of absence, for 14
26 consecutive days or for 28 days in any 12 months; or
27 (c) the Ombudsman engages, except with the Minister's
28 approval, in paid work outside the duties of his or her office
29 (see section 27); or
30 (d) the Ombudsman fails, without reasonable excuse, to comply
31 with section 29 of the *Public Governance, Performance and*

EXPOSURE DRAFT

Australian Small Business and Family Enterprise Ombudsman **Part 2**
Persons assisting the Australian Small Business and Family Enterprise Ombudsman
Division 3

Section 33

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

3 **33 Staff**

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

7 **34 Consultants**

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

EXPOSURE DRAFT

Part 3 Advocating for small businesses and family enterprises

Division 1 Preliminary

Section 35

1 **Part 3—Advocating for small businesses and family**
2 **enterprises**

3 **Division 1—Preliminary**

4 **35 Constitutional connection—meaning of *relevant legislation,***
5 ***policies and practices***

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

- 7 (a) past, present or proposed legislation, policies or practices of
8 Commonwealth agencies, to the extent that they affect or
9 may affect small businesses or family enterprises;
- 10 (b) past, present or proposed legislation, policies or practices of
11 Territory agencies, to the extent that they affect or may affect
12 small businesses or family enterprises;
- 13 (c) past, present or proposed policies or practices of
14 constitutional corporations, to the extent that they affect or
15 may affect small businesses or family enterprises;
- 16 (d) past, present or proposed policies or practices of small
17 businesses or family enterprises that are constituted as, or
18 operated by, a constitutional corporation;
- 19 (e) past, present or proposed policies or practices of any entity,
20 to the extent that those policies or practices affect, or may
21 affect, small businesses or family enterprises in the course of
22 trade or commerce:
23 (i) between Australia and places outside Australia; or
24 (ii) among the States; or
25 (iii) within a Territory, between a State and a Territory or
26 between 2 Territories;
- 27 (f) past, present or proposed policies or practices of any entity in
28 relation to one or more of the following:
29 (i) insurance;
30 (ii) banking;

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**
Preliminary **Division 1**

Section 35

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

EXPOSURE DRAFT

Part 3 Advocating for small businesses and family enterprises

Division 2 Research and inquiries on Ombudsman’s own initiative

Section 36

1 **Division 2—Research and inquiries on Ombudsman’s own**
2 **initiative**

3 **36 Research and inquiries**

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

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

13 **37 Notice to person to provide information and documents**

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

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**
Research and inquiries on Ombudsman's own initiative **Division 2**

Section 38

1 Penalty: 30 penalty units.

2 (5) A person is not subject to a requirement under subsection (4) if:

3 (a) the person does not have the information or document
4 required; and

5 (b) the person has taken all reasonable steps available to the
6 person to obtain the information or document required and
7 has been unable to obtain it.

8 **38 Documents produced in relation to research or inquiry**

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

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

13 (b) may keep possession of the documents for so long as is
14 necessary for the purposes of the research or inquiry to which
15 they relate; and

16 (c) while the Ombudsman has possession of the documents, must
17 permit them to be inspected at all reasonable times by people
18 who would be entitled to inspect them if they were not in the
19 possession of the Ombudsman.

20 **39 Limitation on powers**

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

24 **40 Reports to the Minister**

25 (1) The Ombudsman must give the Minister a report in relation to each
26 quarter that:

27 (a) outlines the research conducted and inquiries made during
28 the quarter; and

29 (b) if the Ombudsman reasonably believes that relevant
30 legislation, policies and practices have had, are having or are

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**
Research and inquiries on Ombudsman's own initiative **Division 2**

Section 41

- 1 (ii) the Minister reasonably believes that it is in the public
2 interest to delete the information or recommendation;
3 and
4 (b) must delete from the report, or the part of the report, any
5 confidential information.
- 6 (4) In making a decision under subparagraph (3)(a)(ii), the Minister
7 must take into account any representations made by the person in
8 response to a notification under subsection (2).
- 9 (5) A direction under subsection (2) (if made in writing) is not a
10 legislative instrument.

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**
Minister may refer matter to Ombudsman for inquiry **Division 3**

Section 43

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

4 **Subdivision B—Notice of inquiry**

5 **43 Notice of inquiry**

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

11 **Subdivision C—Hearings**

12 **44 Application of this Subdivision**

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

15 **45 Notice of hearings**

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

22 **46 Procedure at hearings**

- 23 (1) A hearing must be held in public except in the circumstances set
24 out in subsection (2).

EXPOSURE DRAFT

Part 3 Advocating for small businesses and family enterprises

Division 3 Minister may refer matter to Ombudsman for inquiry

Section 47

- 1 (2) If the Ombudsman reasonably believes that it is in the public
2 interest not to hold the hearing, or a part of it, in public the
3 Ombudsman may:
4 (a) direct that the hearing, or that part of it, take place in private;
5 and
6 (b) give directions as to who may be present.

7 **47 Notice to person to provide information and documents**

- 8 (1) If the Ombudsman reasonably believes that a person has, or could
9 take reasonable steps to obtain, information or documents relevant
10 to the inquiry, the Ombudsman may, by notice, require the person
11 to send to the Ombudsman:
12 (a) a statement setting out the specified information; and
13 (b) specified documents.
- 14 (2) The notice must:
15 (a) be in writing; and
16 (b) specify the period within which the statement and documents
17 referred to in subsection (1) must be sent to the Ombudsman;
18 and
19 (c) be served on the person.
- 20 (3) The period specified in the notice must be a period of at least 10
21 business days commencing on the day the notice is served.
- 22 (4) A person who is served a notice under this section must comply
23 with the notice.
- 24 Penalty: 30 penalty units.
- 25 (5) A person is not subject to a requirement under subsection (4) if:
26 (a) the person does not have the information or document
27 required; and
28 (b) the person has taken all reasonable steps available to the
29 person to obtain the information or document required and
30 has been unable to obtain it.

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**
Minister may refer matter to Ombudsman for inquiry **Division 3**

Section 48

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 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.

EXPOSURE DRAFT

Part 3 Advocating for small businesses and family enterprises

Division 3 Minister may refer matter to Ombudsman for inquiry

Section 50

1 **50 Documents produced in relation to inquiry**

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

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

6 (b) may keep possession of the documents for so long as is
7 necessary for the purposes of the inquiry to which they relate;
8 and

9 (c) while the Ombudsman has possession of the documents, must
10 permit them to be inspected at all reasonable times by people
11 who would be entitled to inspect them if they were not in the
12 possession of the Ombudsman.

13 **51 Allowances to witnesses**

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

17 **52 Restrictions on publication of evidence**

18 (1) If the Ombudsman directs that a hearing, or a part of it, take place
19 in private, the Ombudsman may give directions prohibiting or
20 restricting the publication of:

21 (a) evidence given before the hearing (including evidence given
22 prior to a direction that part of the hearing take place in
23 private); or

24 (b) matters contained in documents given to the Ombudsman in
25 connection with the hearing.

26 (2) A person must not contravene a direction given under this section.

27 Penalty: 30 penalty units.

28 **53 Written statements etc. to be made public**

29 (1) The Ombudsman must make available to the public the contents of:

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**
Minister may refer matter to Ombudsman for inquiry **Division 3**

Section 54

- 1 (a) any written evidence given to the Ombudsman in connection
2 with the inquiry; and
3 (b) any document produced to the Ombudsman in connection
4 with the inquiry.
- 5 (2) However, the Ombudsman must delete any confidential
6 information from the evidence or document before making it
7 publicly available.
- 8 (3) The Ombudsman may make the evidence or document publicly
9 available in any way the Ombudsman thinks fit.

10 **54 Limitation on powers**

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

14 **Subdivision D—Report of inquiry**

15 **55 Ombudsman must prepare a report on the inquiry**

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

20 **56 Report of inquiry to be tabled**

- 21 (1) The Minister must cause a copy of the Ombudsman's report on an
22 inquiry to be tabled in each House of the Parliament:
- 23 (a) within 25 sitting days of that House after the day on which
24 the Minister receives it; or
- 25 (b) if the Ombudsman recommends that the tabling of the report,
26 or part of the report, be delayed for a specified period—
27 within 25 sitting days of that House after the end of that
28 period.

EXPOSURE DRAFT

Part 3 Advocating for small businesses and family enterprises

Division 3 Minister may refer matter to Ombudsman for inquiry

Section 56

- 1 (2) If the publication of information or an opinion in the report would
2 be likely to adversely affect the interests of any person, the
3 Minister must, before tabling the report, direct the Ombudsman:
4 (a) to notify the person that the information or opinion is
5 contained in the report; and
6 (b) to give the person a reasonable period (not exceeding 30
7 days) to make representations, either orally or in writing, in
8 relation to the information or opinion, and its publication.
- 9 (3) Before tabling the report on an inquiry, the Minister:
10 (a) may delete any information or opinion from the report if:
11 (i) the information or opinion would be likely to adversely
12 affect the interests of any person; and
13 (ii) the Minister reasonably believes that it is in the public
14 interest to delete the information or opinion; and
15 (b) must delete from the report any confidential information.
- 16 (4) In making a decision under subparagraph (3)(a)(ii), the Minister
17 must take into account any representations made by the person in
18 response to a notification under subsection (2).
- 19 (5) A direction under subsection (2) (if made in writing) is not a
20 legislative instrument.

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**

Providing advice to the Minister **Division 4**

Section 57

1 **Division 4—Providing advice to the Minister**

2 **57 Minister may refer a matter for advice**

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

25 **58 Minister may publish Ombudsman's advice**

- 26 (1) The Minister may publish advice given by the Ombudsman under
27 section 57 in any way he or she thinks fit.

EXPOSURE DRAFT

Part 3 Advocating for small businesses and family enterprises

Division 4 Providing advice to the Minister

Section 58

- 1 (2) If the publication of information or an opinion in the advice would
2 be likely to adversely affect the interests of any person, the
3 Minister must, before publishing the advice, direct the
4 Ombudsman:
- 5 (a) to notify the person that the information or opinion is
6 contained in the report; and
7 (b) to give the person a reasonable period (not exceeding 30
8 days) to make representations, either orally or in writing, in
9 relation to the information or opinion, and its publication.
- 10 (3) Before publishing the advice, the Minister:
- 11 (a) may delete any information or opinion from the advice if:
- 12 (i) the information or opinion would be likely to adversely
13 affect the interests of any person; and
14 (ii) the Minister reasonably believes that it is in the public
15 interest to delete the information or opinion; and
16 (b) must delete from the advice any confidential information.
- 17 (4) In making a decision under subparagraph (3)(a)(ii), the Minister
18 must take into account any representations made by the person in
19 response to a notification under subsection (2).
- 20 (5) A direction under subsection (2) (if made in writing) is not a
21 legislative instrument.

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**
National strategies **Division 5**

Section 59

1 **Division 5—National strategies**

2 **59 Working co-operatively with Commonwealth, State and**
3 **Territory agencies**

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

9 **60 Secretariat services and research services**

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

EXPOSURE DRAFT

Part 3 Advocating for small businesses and family enterprises

Division 6 Other advocacy functions

Section 61

1 **Division 6—Other advocacy functions**

2 **61 Contributing to inquiries into relevant legislation, policies and**
3 **practices**

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

7 **62 Reviewing proposals relating to relevant legislation, policies and**
8 **practices**

9 *Ombudsman may review on own initiative*

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

17 *Minister may refer to Ombudsman for review*

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

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**

Other advocacy functions **Division 6**

Section 63

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

11 **63 Minister may publish advice given as a result of a review**

- 12 (1) The Minister may publish advice given by the Ombudsman under
13 section 62 in any way he or she thinks fit.
- 14 (2) If the publication of information or an opinion in the advice would
15 be likely to adversely affect the interests of any person, the
16 Minister must, before publishing the advice, direct the
17 Ombudsman:
18 (a) to notify the person that the information or opinion is
19 contained in the report; and
20 (b) to give the person a reasonable period (not exceeding 30
21 days) to make representations, either orally or in writing, in
22 relation to the information or opinion, and its publication.
- 23 (3) Before publishing the advice, the Minister:
24 (a) may delete any information or opinion from the advice if:
25 (i) the information or opinion would be likely to adversely
26 affect the interests of any person; and
27 (ii) the Minister reasonably believes that it is in the public
28 interest to delete the information or opinion; and
29 (b) must delete from the advice any confidential information.

EXPOSURE DRAFT

Part 3 Advocating for small businesses and family enterprises

Division 6 Other advocacy functions

Section 64

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

6 **64 Promoting best practice**

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

- 9 (a) between:
10 (i) Commonwealth agencies; and
11 (ii) small businesses or family enterprises; and
12 (b) between:
13 (i) Territory agencies; and
14 (ii) small businesses or family enterprises; and
15 (c) between:
16 (i) constitutional corporations; and
17 (ii) small businesses or family enterprises; and
18 (d) between:
19 (i) constitutional corporations that are small businesses or
20 family enterprises; and
21 (ii) other entities; and
22 (e) between entities, in the course of trade and commerce:
23 (i) between Australia and places outside Australia; or
24 (ii) among the States; or
25 (iii) within a Territory; or
26 (iv) between a State and a Territory or between 2 Territories;
27 and
28 (f) between:
29 (i) small businesses or family enterprises that are operated
30 by individuals who are resident in a Territory; and
31 (ii) other entities; and
32 (g) between:
-

EXPOSURE DRAFT

Advocating for small businesses and family enterprises **Part 3**

Other advocacy functions **Division 6**

Section 64

- 1 (i) small businesses or family enterprises that are, or are
2 operated by, body corporates the principal place of
3 business of which is in a Territory; and
4 (ii) other entities; and
5 (h) between:
6 (i) small businesses or family enterprises that are operated
7 within a Territory; and
8 (ii) other entities.

EXPOSURE DRAFT

Part 4 Assisting a small business or family enterprise

Division 1 Preliminary

Section 65

1 **Part 4—Assisting a small business or family**
2 **enterprise**

3 **Division 1—Preliminary**

4 **65 Constitutional connection—meaning of *relevant action***

5 Each of the following is a *relevant action*:

- 6 (a) action by an agency of the Commonwealth that affects, or
7 may affect, a small business or family enterprise;
- 8 (b) action by an agency of a Territory that affects, or may affect,
9 a small business or family enterprise;
- 10 (c) action by a constitutional corporation that affects, or may
11 affect, a small business or family enterprise;
- 12 (d) action by any entity that affects a small business or family
13 enterprise that is a constitutional corporation;
- 14 (e) action by any entity that affects, or may affect, a small
15 business or family enterprise in the course of trade or
16 commerce:
17 (i) between Australia and places outside Australia; or
18 (ii) among the States; or
19 (iii) within a Territory, between a State and a Territory or
20 between 2 Territories;
- 21 (f) action in relation one or more of the following:
22 (i) insurance;
23 (ii) banking;
24 (iii) telecommunications;
25 (iv) copyright, patents, designs or trade marks;
26 where that action is by, affects or may affect a small business
27 or family enterprise;
- 28 (g) an action by or that affects or may affect a small business or
29 family enterprise;

EXPOSURE DRAFT

Assisting a small business or family enterprise **Part 4**

Preliminary **Division 1**

Section 65

- 1 (i) that is operated by an individual or individuals resident
2 in a Territory; or
3 (ii) that is, or is operated by, a body corporate or body
4 corporates, the principal place of business of which is in
5 a Territory; or
6 (iii) that is located in a Territory.

EXPOSURE DRAFT

Part 4 Assisting a small business or family enterprise

Division 2 Responding to requests for assistance

Section 66

1 **Division 2—Responding to requests for assistance**

2 **66 Requests for assistance**

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

17 **67 Circumstances in which Ombudsman authorised to deal with a**
18 **request for assistance**

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

EXPOSURE DRAFT

Assisting a small business or family enterprise **Part 4**

Responding to requests for assistance **Division 2**

Section 68

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

68 Circumstances in which Ombudsman may decide not to provide assistance

- 20
21
- 22 (1) The Ombudsman may decide not to give assistance in response to a
23 request, or decide not to give further assistance in response to a
24 request, if:
- 25 (a) the Ombudsman reasonably believes that the person who
26 requested assistance became aware of the action more than
27 12 months before the request was made; or
- 28 (b) the Ombudsman reasonably believes that:
- 29 (i) the request is frivolous or vexatious; or
30 (ii) the request was not made in good faith; or
31 (iii) the person who made the request does not have a
32 sufficient interest in the subject matter of the request; or

EXPOSURE DRAFT

Part 4 Assisting a small business or family enterprise

Division 2 Responding to requests for assistance

Section 69

- 1 (iv) providing assistance in response to the request is not
2 warranted having regard to all the circumstances; or
3 (c) the Ombudsman is required to transfer the request under
4 section 69.
- 5 (2) If a formal request for assistance is made and the Ombudsman
6 decides not to give assistance, or further assistance, under this
7 section, the Ombudsman must give the person who requested
8 assistance notice in writing setting out:
9 (a) the Ombudsman's decision; and
10 (b) the reasons for the Ombudsman's decision.

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

- 13 (1) The Ombudsman must not give assistance in response to a request
14 for assistance in relation to a relevant action, or give further
15 assistance in response to such a request, if:
16 (a) the Ombudsman reasonably believes that:
17 (i) the request could have been made to another agency of
18 the Commonwealth, a State or a Territory; and
19 (ii) the request could be more conveniently or effectively
20 dealt with by the other agency; and
21 (b) under the law of the Commonwealth or of a State or a
22 Territory, the other agency has the power to deal with the
23 request.
- 24 (2) The Ombudsman must not make a decision under subsection (1)
25 unless:
26 (a) the Ombudsman has consulted with the other agency about
27 whether it would be more convenient or effective for the
28 other agency to deal with the request; or
29 (b) the Ombudsman has consulted with the other agency about
30 whether it would be more convenient or effective for the
31 other agency to deal with a particular class of requests, and
32 the request is one of that class.

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Assisting a small business or family enterprise **Part 4**

Responding to requests for assistance **Division 2**

Section 70

- 1 (3) If the Ombudsman makes a decision not to give assistance, or
2 further assistance, under subsection (1), the Ombudsman must
3 transfer the request to the other agency.
- 4 (4) The Ombudsman must:
- 5 (a) transfer the request as soon as is reasonably practicable; and
6 (b) give the other agency any information or documents relating
7 to the request that are in the possession, or under the control,
8 of the Ombudsman; and
9 (c) as soon as is reasonably practicable give the person who
10 made the request notice that the request has been transferred
11 to the other agency.
- 12 (5) If the request is a formal request, the notice under paragraph (4)(c)
13 must be in writing.

14 **70 Circumstances in which the Ombudsman may work** 15 **co-operatively with another agency to give assistance**

- 16 (1) The Ombudsman may enter into an arrangement with another
17 agency of the Commonwealth, a State or a Territory, to work
18 co-operatively with the other agency:
- 19 (a) to deal with a request for assistance in relation to a relevant
20 action; and
21 (b) to deal with a class of requests for assistance in relation to
22 relevant actions.
- 23 (2) The Ombudsman may only enter into an arrangement with another
24 agency under subsection (1), if:
- 25 (a) the Ombudsman reasonably believes that:
- 26 (i) a request for assistance in relation to the relevant action,
27 an aspect of the relevant action or a matter that is
28 incidental to the relevant action in relation to which the
29 request is, or requests of the class are, made could have
30 been made to the other agency; and
31 (ii) the other agency is willing to work co-operatively with
32 the Ombudsman to give assistance; and

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Part 4 Assisting a small business or family enterprise

Division 2 Responding to requests for assistance

Section 70

- 1 (iii) assistance could be more conveniently or effectively
2 given if the Ombudsman worked co-operatively with
3 that agency; and
- 4 (b) under the law of the Commonwealth or of a State or a
5 Territory, the other agency has the power to deal with the
6 request, or class of requests, to which the arrangement
7 relates.
- 8 (3) If the Ombudsman receives a request for assistance in relation to
9 which the Ombudsman has entered into an arrangement under
10 subsection (1), or that is of a class in relation to which the
11 Ombudsman has entered into an arrangement under subsection (1),
12 the Ombudsman must:
- 13 (a) give the other agency any information or documents:
14 (i) that relate to the request and are relevant to the matters
15 to be dealt with by the agency; and
16 (ii) that are in the possession, or under the control, of the
17 Ombudsman; and
- 18 (b) as soon as is reasonably practicable give the person who
19 made the request notice that the Ombudsman will work
20 co-operatively, as far as is possible, with the other agency to
21 deal with the request.
- 22 (4) If the request is a formal request, the notice under paragraph (3)(b)
23 must be in writing.

EXPOSURE DRAFT

Assisting a small business or family enterprise **Part 4**

Assistance in a dispute **Division 3**

Section 71

1 **Division 3—Assistance in a dispute**

2 **71 Ombudsman may recommend alternative dispute resolution**
3 **process**

- 4 (1) If a person requests the Ombudsman to give assistance in a dispute
5 in relation to a relevant action, the Ombudsman may make
6 recommendations on how the dispute may be managed.
- 7 (2) Without limiting subsection (1), the Ombudsman may recommend
8 that the parties to the dispute should take part in an alternative
9 dispute resolution process, or alternative dispute resolution
10 processes, of the kind specified in the recommendation.
- 11 (3) If the Ombudsman recommends an alternative dispute resolution
12 process or alternative dispute resolution processes, the
13 Ombudsman must give notice, in writing, of the recommendation
14 to the parties to the dispute.
- 15 (4) The notice must include a warning that if:
16 (a) the parties do not undertake the alternative dispute resolution
17 process or processes recommended; or
18 (b) withdraw from the alternative dispute resolution process or
19 processes recommended;
20 the Ombudsman may publicise that fact.

21 **72 List of alternative dispute resolution providers**

- 22 (1) The Ombudsman may publish a list of persons who:
23 (a) have the qualifications or experience to conduct alternative
24 dispute resolution processes to resolve disputes in relation to
25 relevant actions; and
26 (b) the rates that providers on the list have agreed to charge in
27 conducting alternative dispute resolution processes to resolve
28 disputes in relation to relevant actions.
- 29 (2) The Minister may, by legislative instrument, prescribe:
-

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Part 4 Assisting a small business or family enterprise

Division 3 Assistance in a dispute

Section 73

- 1 (a) the qualifications or experience required for persons to be
2 included on the list; and
3 (b) rules to ensure that alternative dispute resolution processes
4 offered by persons included on the list are available in a way
5 that is convenient and effective for the parties to disputes in
6 relation to relevant actions.

7 **73 Alternative dispute resolution processes not to be conducted by** 8 **the Ombudsman**

- 9 (1) An alternative dispute resolution process recommended by the
10 Ombudsman is to be conducted by a person, other than a person
11 mentioned in subsection (2), chosen by the parties to the dispute.
12 (2) An alternative dispute resolution process recommended by the
13 Ombudsman must not be conducted by:
14 (a) the Ombudsman; or
15 (b) a delegate of the Ombudsman; or
16 (c) a person assisting the Ombudsman under section 33; or
17 (d) a person engaged as a consultant under section 34.

18 **74 Publishing failure to participate in alternative dispute resolution** 19 **process**

- 20 (1) The Ombudsman may publicise, in any way that the Ombudsman
21 thinks appropriate, either or both of the following:
22 (a) that an entity who is a party to a dispute in relation to a
23 relevant action has refused to engage in an alternative dispute
24 resolution process recommended by the Ombudsman;
25 (b) that an entity who is a party to a dispute in relation to a
26 relevant action has withdrawn from an alternative dispute
27 resolution process recommended by the Ombudsman.
28 (2) This section does not:
29 (a) limit the power of the Ombudsman or anyone else to
30 publicise a matter or a person's name; or

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Assisting a small business or family enterprise **Part 4**
Assistance in a dispute **Division 3**

Section 74

- 1 (b) prevent anyone else from publicising a matter or a person's
2 name; or
3 (c) affect any obligation (however imposed) on anyone else to
4 publicise a matter or a person's name.

EXPOSURE DRAFT

Part 4 Assisting a small business or family enterprise

Division 4 Gathering information about requests for assistance

Section 75

1 **Division 4—Gathering information about requests for**
2 **assistance**

3 **75 Inquiries in relation to a request for assistance**

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

- 6 (a) deciding whether a request for assistance is one which the
7 Ombudsman is authorised to deal with;
- 8 (b) deciding whether to refuse a request for assistance;
- 9 (c) deciding whether a request for assistance could be more
10 conveniently or effectively dealt with by another agency of
11 the Commonwealth, a State or a Territory;
- 12 (d) consulting with the Commonwealth Ombudsman on a
13 proposed direction to transfer a request for assistance in
14 relation to a relevant action, or relevant actions of a particular
15 kind, to the Commonwealth Ombudsman;
- 16 (e) deciding whether a request for assistance could be more
17 conveniently or effectively dealt with by working
18 co-operatively with another agency of the Commonwealth, a
19 State or a Territory;
- 20 (f) deciding whether to recommend an alternative dispute
21 resolution process, or alternative dispute resolution
22 processes, to assist in a dispute in relation to a relevant
23 action, and which process or processes to recommend;
- 24 (g) obtaining details of the parties to a dispute in relation to a
25 relevant action for the purposes of performing functions or
26 duties, or exercising powers, under this Act in relation to the
27 dispute;
- 28 (h) deciding what other action the Ombudsman will take in
29 giving assistance in response to a request.

EXPOSURE DRAFT

Assisting a small business or family enterprise **Part 4**
Gathering information about requests for assistance **Division 4**

Section 76

1 **76 Notice to person to provide information and documents**

- 2 (1) If the Ombudsman reasonably believes that a person has, or could
3 take reasonable steps to obtain, information or documents relevant
4 to an inquiry under this Division, the Ombudsman may, by notice,
5 require the person to send to the Ombudsman:
6 (a) a statement setting out the specified information; and
7 (b) specified documents.
- 8 (2) The notice must:
9 (a) be in writing; and
10 (b) specify the period within which the statement and documents
11 referred to in subsection (1) must be sent to the Ombudsman;
12 and
13 (c) be served on the person.
- 14 (3) The period specified in the notice must be a period of at least 10
15 business days commencing on the day the notice is served.
- 16 (4) A person who is served a notice under this section must comply
17 with the notice.
- 18 Penalty: 30 penalty units.
- 19 (5) A person is not subject to a requirement under subsection (4) if:
20 (a) the person does not have the information or document
21 required; and
22 (b) the person has taken all reasonable steps available to the
23 person to obtain the information or document required and
24 has been unable to obtain it.

25 **77 Documents produced in relation to inquiry**

- 26 If documents are produced or given to the Ombudsman under this
27 Division, the Ombudsman:
28 (a) may take possession of, and make copies of, or take extracts
29 from, the documents; and

EXPOSURE DRAFT

Part 4 Assisting a small business or family enterprise

Division 4 Gathering information about requests for assistance

Section 78

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

8 **78 Limitation on powers**

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

EXPOSURE DRAFT

General requirements **Part 5**
Concurrent operation of State Law **Division 1**

Section 79

1 **Part 5—General requirements**

2 **Division 1—Concurrent operation of State Law**

3 **79 Concurrent operation of State law**

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

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

EXPOSURE DRAFT

Part 5 General requirements

Division 2 Secrecy

Section 80

1 **Division 2—Secrecy**

2 **80 Meaning of *protected information***

3 *Protected information* is information that:

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

8 **81 Meaning of *person assisting small business/family enterprise***

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

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

17 **82 Use or disclosure of protected information**

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

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

EXPOSURE DRAFT

1

Exceptions

2

- (2) Each of the following is an exception to the prohibition in subsection (1):

3

4

- (a) the disclosure or use is authorised by a provision of this Act or a legislative instrument under this Act;

5

6

- (b) the disclosure or use is in compliance with a requirement under:

7

8

- (i) a law of the Commonwealth; or

9

- (ii) a law of a State or a Territory.

10

Note: A defendant bears an evidential burden in relation to a matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

11

12

- (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:

13

14

15

16

- (a) to produce to a court or tribunal a document containing protected information; or

17

18

- (b) to disclose protected information to a court or tribunal.

19

83 Disclosure or use for the purposes of this Act

20

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.

21

22

23

84 Disclosure to the Minister

24

- (1) Any of the following persons:

25

- (a) the Ombudsman;

26

- (b) a delegate of the Ombudsman;

27

- (c) a person assisting the Ombudsman under section 33;

28

may disclose protected information to the Minister.

EXPOSURE DRAFT

Part 5 General requirements

Division 2 Secrecy

Section 85

- 1 (2) However, information must not be disclosed to the Minister under
2 this section if it relates to a request for assistance in relation to a
3 dispute with the Department.

4 **85 Disclosure to the Secretary etc.**

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

18 **86 Disclosure to certain agencies, bodies and persons**

19 *When this section applies*

- 20 (1) This section applies if the Ombudsman reasonably believes that
21 protected information will enable or assist any of the following
22 agencies or bodies to perform or exercise any of the functions or
23 powers of the agency or body:
24 (a) the Commonwealth Ombudsman;
25 (b) an agency of a State or a Territory the functions of which
26 include a function that corresponds to a function of the
27 Ombudsman;
28 (c) the Australian Securities and Investments Commission;
29 (d) the Australian Competition Tribunal;
30 (e) the National Competition Council;

EXPOSURE DRAFT

- 1 (f) the Australian Competition and Consumer Commission;
2 (g) any other prescribed agency of the Commonwealth, a State or
3 a Territory;
4 (h) any professional disciplinary body prescribed.

5 *Disclosure*

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

14 *Conditions*

- 15 (4) The Ombudsman may, by writing, impose conditions to be
16 complied with in relation to protected information disclosed under
17 subsection (2) or (3).

18 *Offence—breach of condition*

- 19 (5) A person commits an offence if:
20 (a) the person is subject to a condition under subsection (4); and
21 (b) the person engages in conduct; and
22 (c) the person's conduct breaches the condition.

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

- 24 (6) An instrument under subsection (4) is not a legislative instrument.

25 *Offence—unauthorised disclosure by professional disciplinary*
26 *bodies*

- 27 (7) A person commits an offence if:
-

EXPOSURE DRAFT

Part 5 General requirements

Division 2 Secrecy

Section 87

- 1 (a) the person is:
- 2 (i) a professional disciplinary body prescribed for the
- 3 purpose of paragraph (1)(h); or
- 4 (ii) a member of such a professional disciplinary body; and
- 5 (b) protected information has been disclosed under
- 6 subsection (2) or (3) to the body; and
- 7 (c) the person:
- 8 (i) discloses the information to another person; or
- 9 (ii) uses the information; and
- 10 (d) the disclosure or use is not:
- 11 (i) with the consent of the Ombudsman; or
- 12 (ii) for the purpose of deciding whether or not to take
- 13 disciplinary or other action; or
- 14 (iii) for the purpose of taking disciplinary or other action.

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

16 **87 Disclosure with consent**

17 A person assisting small business/family enterprise may disclose or

18 use protected information that relates to the affairs of a person if:

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

21 **88 Disclosure to reduce threat to life or health**

22 A person assisting small business/family enterprise may disclose or

23 use protected information if:

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

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1 **89 Disclosure of publicly available information**

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

4 **90 Disclosure of summaries or statistics**

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

7 (a) summaries of protected information; or

8 (b) statistics derived from protected information;

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

11 **91 Disclosure for purposes of law enforcement and national security**

12 *Scope*

13 (1) This section applies if the Ombudsman reasonably believes that the
14 disclosure of protected information is reasonably necessary for:

15 (a) the enforcement of the criminal law; or

16 (b) the enforcement of a law imposing a pecuniary penalty; or

17 (c) the protection of the public revenue; or

18 (d) the protection of national security.

19 *Disclosure*

20 (2) The Ombudsman may disclose that protected information to:

21 (a) an agency of the Commonwealth, a State or a Territory; or

22 (b) an Australian police force;

23 whose functions include that enforcement or protection, for the
24 purposes of that enforcement or protection.

25 (3) If a delegate of the Ombudsman, or a person assisting the
26 Ombudsman under section 33, is authorised by the Ombudsman, in
27 writing, for the purposes of this section, the individual may
28 disclose that protected information to:

EXPOSURE DRAFT

Part 5 General requirements

Division 2 Secrecy

Section 91

- 1 (a) an agency of the Commonwealth, a State or a Territory; or
2 (b) an Australian police force;
3 whose functions include that enforcement or protection, for the
4 purposes of that enforcement or protection.

5 *Secondary disclosure and use*

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

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

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

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

EXPOSURE DRAFT

General requirements **Part 5**
Secrecy **Division 2**

Section 91

1

Conditions

2

(6) The Ombudsman may, by writing, impose conditions to be
3 complied with in relation to protected information disclosed under
4 subsection (2) or (3).

5

(7) A person commits an offence if:

6

(a) the person is subject to a condition under subsection (6); and

7

(b) the person engages in conduct; and

8

(c) the person's conduct breaches the condition.

9

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

10

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

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Part 5 General requirements

Division 3 Review of decisions

Section 92

1 **Division 3—Review of decisions**

2 **92 Review by the Administrative Appeals Tribunal**

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

- 5 (a) a decision under paragraph 9(1)(a), (b) or (c) that information
6 is not to be treated as confidential information;
- 7 (b) a decision under subparagraph 41(3)(a)(ii), 56(3)(a)(ii),
8 58(3)(a)(ii) or 63(3)(a)(ii) that it is not in the public interest
9 to delete information, a recommendation or an opinion from
10 a report or an advice before the report or advice is tabled or
11 published;
- 12 (c) a decision under subsection 74(1) to publicise that a party to
13 a dispute has refused to engage in, or has withdrawn from, an
14 alternative dispute resolution process.

1 **Division 4—Other matters**

2 **93 Privileges not abrogated**

3 *Self-incrimination*

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

8 *Legal professional privilege*

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

15 *Other legislation not affected*

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

19 **94 Provisions of other Acts in relation to information and documents**

20 Nothing in this Act affects the operation of any other law of the
21 Commonwealth to the extent that the other law limits the use or
22 disclosure of information or a document.

23 **95 Review of assistance function**

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

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Part 5 General requirements

Division 4 Other matters

Section 96

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

26 **96 Legislative instrument**

- 27 The Minister may, by legislative instrument, make rules
28 prescribing matters:
- 29 (a) required or permitted by this Act to be prescribed by the
30 rules; or
31 (b) necessary or convenient to be prescribed for carrying out or
32 giving effect to this Act.