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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**HOUSE OF REPRESENTATIVES**

# POSTAL INDUSTRY OMBUDSMAN BILL 2005

## REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Helen Coonan, Minister for Communications, Information Technology and the Arts)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE SENATE TO THE BILL AS INTRODUCED

# POSTAL INDUSTRY OMBUDSMAN BILL 2005

## OUTLINE

While Australia Post is already a prescribed authority for the purposes of the *Ombudsman Act 1976* (the Ombudsman Act) and therefore subject to investigation by the Commonwealth Ombudsman (CO), there is no dedicated, single entity with responsibility for investigating complaints about other postal operators. Currently, any complaints about actions taken by these operators are referred to the State and Territory Offices of Fair Trading for investigation.

This Bill amends the Ombudsman Act to provide for the establishment of a Postal Industry Ombudsman (PIO). The establishment of the PIO is the result of a 2001 election commitment that recognised the need for a dedicated and independent entity to deal with complaints about the provision of postal services.

This Bill establishes a PIO within the office of the CO by inserting a new Part into the Ombudsman Act. This Part deals with the establishment, functions, powers and duties of the PIO. Some provisions from the Ombudsman Act are applied by cross-reference to the PIO. Other matters dealing with the establishment, functions, powers and duties of the PIO are included in new provisions contained in the new Part. These cross-references and amendments to the Ombudsman Act are explained in more detail in the notes on clauses.

The PIO will be responsible for investigating complaints against or actions taken by Australia Post in relation to the provision of postal or similar services. These investigations would previously have been conducted by the CO. The PIO will also be able to investigate complaints against or actions taken by other postal operators who are required to register or choose to register with the PIO. Operators who do not register will remain subject to the authority of State and Territory Offices of Fair Trading.

The powers, functions and duties of the PIO are dealt with in a separate part of the Ombudsman Act, consistent with the provisions relating to the Defence Force Ombudsman. This new Part sets out the specific role of the PIO in investigating actions related to the delivery of postal and other like services. These services may include postal services, such as letter services, parcel or packet services or courier services. Examples of the types of actions which may be investigated could include the mishandling of mail, loss of parcels or service complaints.

As the PIO will have jurisdiction over non-government entities, including those which have voluntarily registered with the PIO, the PIO's powers under the new Part will vary somewhat to those of the CO, set out in the main part of the Ombudsman Act. The intent will be to avoid applying powers which are not considered necessary and which may act as a deterrent to a postal operator registering with the PIO. For example, the PIO will not have the power to enter premises to carry out an investigation.

The powers of the PIO will not replace the CO's existing powers to investigate action taken by Australia Post. The CO will continue to investigate action by Australia Post that relates to a matter of administration. Examples of these types of action are the handling of requests under the *Freedom of Information Act 1982*, the handling of pre-employment matters, the handling of tenders and contracts, or the handling of employee compensation.

If a complaint is made about Australia Post to either the PIO or the CO and it is the view of the recipient of the complaint that it would be more appropriately dealt with by the other Ombudsman, then the complaint may be transferred. When under investigation by the PIO, Australia Post will be subject to the same investigative regime applying to registered postal operators. However, if at any time the PIO considers that the investigation of an action by Australia Post warrants the exercise of the powers of the CO, the investigation of that action may be dealt with by the CO.

The Bill provides that the costs of the PIO will be funded by Australia Post and any other postal operator who registers with the PIO, based on investigations into Australia Post and the registered PPOs that have been completed. The PIO's costs will be those costs which are not met in the Budget funding already provided to the CO to cover the costs of investigating the actions of government agencies such as Australia Post. These costs will be determined by the Minister responsible for administering the *Australian Postal Corporation Act 1989* for each financial year.

The amount determined by the Minister will be recovered from Australia Post and registered private postal operators by the Australian Communications Authority. The amount recovered from each postal service provider will depend on the number of complaints and the complexity of the complaints the PIO has investigated. The detailed methodology for calculating these costs will be prescribed in regulations.

In some instances, provisions in the new Part have been drafted differently from provisions in the current Act covering similar matters. This is done with the intention of modernising the drafting style. The Ombudsman Act is currently under review and it is anticipated that similar drafting changes would be proposed for the Ombudsman Act once the review is completed.

## FINANCIAL IMPACT STATEMENT

As the costs of the PIO are to be recovered from Australia Post and other registered postal operators, the Bill will not have any significant impact on Commonwealth expenditure or revenue.

# ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

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| ACA: | Australian Communications Authority |
| Ombudsman Act: | *Ombudsman Act 1976* |
| APC Act: | *Australian Postal Corporation Act 1989* |
| Bill: | Postal Industry Ombudsman Bill 2005 |
| CO: | Commonwealth Ombudsman |
| DFO: | Defence Force Ombudsman |
| Minister: | Unless otherwise provided, Minister means the Minister responsible for the administration of the *Ombudsman Act 1976* |
| OPC: | Office of Parliamentary Counsel |
| PIO: | Postal Industry Ombudsman |
| PIO Act: | the proposed *Postal Industry Ombudsman Act 2005* |
| PPO: | Private Postal Operator |

# NOTES ON CLAUSES

**Preliminary Comment**

It is proposed to review the Ombudsman Act in the near future. In the nearly thirty years since the Ombudsman Act was drafted, the drafting style employed by the OPC has changed. Following review, it is envisaged that the Ombudsman Act will be redrafted to modernise the drafting style and better to reflect the administrative practices of the CO. The amendments made to the Ombudsman Act to establish the PIO scheme have been drafted in anticipation of these changes. It is not intended that the amendments made to the Ombudsman Act by the *Postal Industry Ombudsman Act 2005* should influence the interpretation of other parts of the Act.

**Clause 1 – Short title**

Clause 1 provides that the Bill, when enacted, may be cited as the *Postal Industry Ombudsman Act 2005*.

**Clause 2 – Commencement**

Subclause 2(1) provides that the provisions of the PIO Act specified in column 1 of the table in clause 2 commence in accordance with column 2 of the table and that any other statement in column 2 of the table has effect according to its terms. In effect, sections 1 to 3 of the PIO Act, and anything not covered elsewhere by the table, commence on the date on which the PIO Act receives the Royal Assent.

Schedule 1 commences on a day to be fixed by Proclamation. However, if any of the provisions do not commence within the period of 6 months from the day on which the Ombudsman Act receives the Royal Assent, they commence on the first day after the end of that period.

The table also provides for the commencement date of other legislation which has amended sections of the Ombudsman Act.

The items in Schedule 2 all correct errors in the Ombudsman Act from the date on which the errors occurred. They are therefore expressed to have commenced retrospectively.

Subclause 2(2) provides that the additional information in column 3 of the table is not part of the Act. Information in that column may be added to or edited in any published version of the Act.

**Clause 3 – Schedule(s)**

Clause 3 provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in that Schedule and any other item in a Schedule has effect according to its terms. Schedule 1 to the Bill amends the Ombudsman Act. Schedule 2 amends other Acts.

## Schedule 1 – Amendments relating to the Postal Industry Ombudsman

### Part 1 - Amendment of the Ombudsman Act 1976

#### Item 1 - Title

Item 1 amends the long title of the Ombudsman Act to include a reference to the Postal Industry Ombudsman so that the title reflects all the subject matter of the Act.

#### Item 2 - Subsection 3(1)

This item inserts a new definition of "ACA". "ACA" is already defined for the purposes of subsections 6(4D) and (4E) of the Ombudsman Act as meaning "Australian Communications Authority". The insertion of the same definition into subsection 3(1) means that it applies for the purposes of the Act, not just for the purposes of those subsections.

#### Item 3 – Subsection 3(1)

This item inserts a definition of "Australia Post" to mean the Australian Postal Corporation. This is necessary because, although the CO has jurisdiction over Australia Post, Australia Post is not referred to in the Ombudsman Act by name as it falls within the definition of "prescribed authority" in subsection 3(1) of the Act.

#### Item 4 – Subsection 3(1) (at the end of definition of *officer*)

This Item inserts a note after the definition of "officer" in subsection 3(1) to clarify that the meaning of "officer", for the purposes of new Part IIB, is set out in section 19G. This note is intended to avoid confusion that might arise over having two definitions of "officer" in the Act.

#### Item 5 – Subsection 3(1)

This item defines "postal or similar service" to include a postal service, a courier service and a packet or parcel carrying service. The definition is integral to establishing the PIO's jurisdiction (in subsection 19M(3)). It is also used to define a PPO in subsection 3(1).

#### Item 6 – Subsection 3(1))

This item explains that PPO stands for Private Postal Operator - an entity operating in the private sector to provide postal or similar services, as distinct from Australia Post which is established for a public purpose under an enactment. Providing services in addition to postal or similar services does not prevent a body, other than Australia Post, from falling within the definition of a PPO.

**Item 7 – Subsection 3(1) (at the end of the definition of *principal officer***

This item inserts a note after the definition of "principal officer" in subsection 3(1) to clarify that the meaning of "principal officer", for the purposes of the provisions in Part IIB is set out in proposed section 19G. This note is intended to avoid confusion that might arise over having two definitions of "principal officer" in the Act.

**Item 8 – Subsection 3(1)**

This item defines a "registered PPO" to be a PPO registered under Part IIB of the Act. The effect of registration is to bring a PPO within the PIO's jurisdiction.

The note following the definition of "registered PPO" explains that, in certain circumstances, a PPO that is no longer registered for the purposes of Part IIB may still be treated as a registered PPO. The notes refers to proposed section 19J which allows the PIO to investigate a complaint about a PPO if the action to which the complaint refers was undertaken within 12 months of the complaint being made regardless of whether the PPO has applied to be deregistered.

**Item 9 - After subsection 3(6C)**

This item inserts a new subsection 3(6D) into the Act. The effect of the provision is to make a registered PPO responsible, <u>for the purposes of the Act,</u> for the actions of its officers, if an officer takes action or purports to take action because he or she is an officer of the registered PPO. The registered PPO is responsible for its officers' actions whether or not the action is taken for, in connection with, or even incidentally to, the provision of a postal or similar service by the registered PPO. The registered PPO is also responsible for the actions of its officers, even if the taking of the action is not within the duties of the officer.

**Item 10 – Subsection 6(4F)**

This item repeals the definition of ACA for the purposes of subsections 6(4D) and (4E). ACA is now defined in subsection 3(1) for the purposes of the Act (see item 2).

**Item 11 – After Part IIA**

This item inserts new Part IIB, which establishes the Office of the PIO into the Act after Part IIA and sets out the powers and functions of the PIO.

## Part IIB – Establishment, functions, powers and duties of the Postal Industry Ombudsman

### Division 1- Preliminary

#### Proposed section 19G - Definitions

Section 19G inserts definitions of "officer" and "principal officer" which are to apply for the purposes of Part IIB.

Paragraph (a) of the definition of "officer" explains who is an officer in relation to Australia Post. Persons who are employed in the service of Australia Post and members of staff of Australia Post are officers even if they are not employed by Australia Post, as are persons authorised by Australia Post to exercise any powers or functions of Australia Post on its behalf. This definition reflects the definition of "officer" for the purposes of a prescribed authority.

Paragraph (b) of the definition of "officer" explains who is an officer in relation to a PPO. Where the registered PPO is an individual, the individual himself or herself or an individual employed by the registered PPO is an officer of the PPO. A director, the secretary or an employee of a registered PPO which is a body corporate is an officer of a registered PPO. A partner in a partnership or an employee of the partnership is an officer of a registered PPO which is a partnership.

Paragraph (a) of the definition of "principal officer" relates to Australia Post. The Managing Director of Australia Post is the principal officer of Australia Post.

Paragraph (b) of the definition of "principal officer" relates to a registered PPO. If a registered PPO is an individual, that individual is the principal officer of the registered PPO. For all other entities the principal officer of a registered PPO is the natural person primarily responsible for the management of the registered PPO.

#### Proposed section 19H - Action taken by contractors

Proposed section 19H explains that actions which are taken by persons contracted by Australia Post or a registered PPO are taken to be actions taken by Australia Post or the registered PPO for the purposes of Part IIB. This is to ensure that Australia Post, or a registered PPO, is responsible for these actions as well as being responsible for the actions of their employees.

Proposed subsections (1) and (2) provide that if a contractor or their employee takes action in relation to the provision of postal or similar services, in accordance with a contract with Australia Post or a registered PPO, the action is deemed to have been taken by Australia Post or the registered PPO.

Proposed subsection (3) sets out the persons who will be taken to be officers of Australia Post or a registered PPO for the purposes of Part IIB. These are the person who took an action, a contractor (if the action was taken by the employee of the

contractor), the directors and the secretary (if the contractor is a body corporate) or the partners in a partnership (if the contractor is a partnership).

Proposed subsection (4) defines a contractor for the purposes of section 19H as a person who is a party to the postal services contract or a person who is subcontracted for the provision of services covered by the postal services contract.

A postal services contract is defined in proposed subsection (4) as a contract relating to the provision of postal or similar services within Australia. This provision is intended to provide that section 19H captures actions taken by Australia Post or a registered PPO overseas but not the overseas actions of contractors or subcontractors. Bilateral and multilateral agreements are not intended to fall within the PIO's jurisdiction.

**Proposed section 19J – Continued application of this Act to deregistered PPOs**

This provision provides that the PIO can continue to investigate actions taken by PPOs even if they have been deregistered. This is to avoid a registered PPO from deregistering to avoid investigation of an action by the PIO.

Once a PPO has been registered as a PPO, the PIO has jurisdiction to investigate complaints about any action taken by the PPO while it is registered and after it has applied to be deregistered if the complaint relates to an action which took place while the PPO was registered and within 12 months of the complaint being made.

**Proposed section 19K – Part IIB not to affect operation of this Act**

This provision explains that, in interpreting the Act, Part IIB is not to be implied to affect the operation of other provisions in the Act. It is necessary to include this provision because of differences in drafting style between the amendments made to the Ombudsman Act by the *Postal Industry Ombudsman Act 2005* and earlier provisions of the Act. This provision is intended to override the general principle of statutory interpretation that, when interpreting an Act, no part can be considered in isolation from its context - the Ombudsman Act must be read as a whole.

For example, specific provisions are included in the Ombudsman Act (for example subsection 8(5)) which set out the particular procedures to be followed by the CO to ensure procedural fairness in the investigation of complaints. While these provisions will also apply to the PIO, Part IIB inserts a new provision which provides that the common law rules of procedural fairness are to apply generally to the PIO in the exercise of his or her powers.

## Division 2 - Establishment and functions of the Postal Industry Ombudsman

**Proposed section 19L – Establishment of office of Postal Industry Ombudsman**

This section establishes the office of the PIO and provides that the office of PIO is to be held by the same person who holds the office of CO. (This includes a person who is the CO because he or she has been appointed to act in the position under section 29 of the Act). The establishment of the PIO will involve creating a dedicated and nominated

office within the CO's office consistent with the approach taken for the establishment of the Defence Force Ombudsman (DFO).

There is likely to be a specialist employed by the PIO to investigate actions related to the provision of postal services. The exercise of routine powers by the PIO will be by the staff of the PIO.

**Proposed section 19M – Functions of the Postal Industry Ombudsman**

Proposed section 19M provides that, subject to some exclusions (set out in proposed subsections (4) and (5)), the functions of the PIO are to investigate complaints or to initiate investigations about actions taken by Australia Post or a registered PPO in relation to the provision of postal or similar services.

Proposed subsection (4) provides that the PIO cannot investigate complaints made by Australia Post or registered PPOs about each other. Nor can the PIO investigate complaints made more than 12 months after the action to which the complaint refers was taken.

Proposed subsection (5) provides that the PIO may only investigate an action on his or her initiative (that is, without a complaint having been made), if the investigation is started no later than 12 months after the action was taken.

**Section 19N - Discretion to investigate complaints as Commonwealth Ombudsman or as Postal Industry Ombudsman**

This proposed section applies only with respect to actions taken by Australia Post. It does not have any application in relation to registered PPOs. The purpose of the provision is to allow discretion for complaints about Australia Post to be investigated by either the CO or PIO, regardless of the office to which the complaint has been made. This is to ensure that complaints are handled by the Ombudsman with the more appropriate powers. For example, a complaint about the provision of postal services made to the CO may be transferred to the PIO and a complaint about an administrative decision made to the PIO may be transferred to the CO.

Proposed subsections 19N(2) to (4) provide that if a complaint is made to the PIO and it is the opinion of the PIO that it would be more appropriately dealt with by the CO the PIO may decide to transfer the complaint, or part of the complaint, to the CO. If this occurs, the complaint is taken to have been made to the CO.

Proposed subsections 19N(5) to (7) deal with the transfer of complaints from the CO to the PIO. Where the CO considers that a complaint or part of a complaint would be more appropriately dealt with by the PIO, and where the complaint is made no later than 12 months after the action to which the complaint refers was taken, the CO may transfer the complaint to the PIO. A complaint, or part of a complaint, referred from the CO to the PIO is taken to be a complaint that was made to the PIO.

Proposed subsection (8) provides that in considering whether a complaint would be more appropriately dealt with by the other Ombudsman, that the PIO and CO must have regard to the functions and duties of each Ombudsman.

Proposed subsection (9) provides that the complainant must be notified in writing if a complaint is transferred between the CO and the PIO.

There is no limit on the number of times a complaint or part of a complaint can be transferred between the CO and the PIO and vice versa.

**Proposed section 19P – Discretion to refer complaint to another statutory office-holder**

This proposed section gives the PIO a discretion to transfer a complaint, which he or she has received about the provision of a postal or similar service by Australia Post or a registered PPO, to another statutory office holder other than the CO. The discretion can be exercised before or after the PIO has started investigating the complaint, if the PIO forms the view that a statutory office-holder (other than the PIO or the CO) has the function of investigating, reviewing or inquiring into the kind of action that is the subject of the complaint and the action could be more conveniently or effectively be dealt with by the other statutory office-holder.

An example of the kind of statutory office-holder to which it is envisaged a complaint may be transferred is the Privacy Commissioner. The Privacy Commissioner may, for example, be better able to deal with a complaint about a privacy issue related to the provision of a postal service.

Proposed subsections (2) and (3) provide that if the PIO, having formed the opinion that another statutory office holder has the function of investigating, reviewing or enquiring into action of that kind and the action could be more conveniently dealt with by that statutory office-holder, decides not to investigate the action or not to investigate the action further, the PIO must transfer the complaint to the other statutory office-holder. The PIO must also give statutory office-holder any relevant documents or information he or she has about the complaint and notify the complainant in writing that the complaint has been transferred.

Proposed subsection (4) defines a statutory office holder to be a person who holds any office or appointment under a law of the Commonwealth, a State or Territory.

**Proposed section 19Q - Discretion not to investigate certain complaints**

This proposed section gives the PIO a discretion not to investigate a complaint or, if an investigation has begun, not to investigate it further. The discretion can be exercised where the PIO is of the opinion that the complaint is frivolous or vexatious or not made in good faith, the complainant does not have a sufficient interest in the complaint, or an investigation or, further investigation, is not warranted, having regard to all the circumstances.

There are also discretions about whether or not to investigate a complaint which are applied by the application of parts of section 6 of the Ombudsman Act to the PIO. These applications are detailed in relation to proposed section 19R under the heading, “Application of current provisions of the Ombudsman Act to the PIO”.

## Division 3 – Powers and duties of the Postal Industry Ombudsman

### Proposed section 19R - Application of other provisions of the Act to the Postal Industry Ombudsman

This section sets out which of the provisions that existed in the Ombudsman Act before its amendment by the *Postal Industry Ombudsman Act 2005* will apply in relation to the PIO and how they will apply. Subject to any contrary intention, the provisions set out in proposed subsection (3) apply, being:

- those in Part I of the Act, except subsections 3(2) to (5A), subsections 3(6A) to (6C), subsections 3(7A) and (7B), subsections 3(9) to (18) and section 3A;
- those in Part II of the Act, except sections 4 and 5, subsection 6(1), subsections 6(4A) to (4H), subsections 6(6) to (15), section 6A, paragraph 8(7A)(b), subsections 8(8) to (10), sections 8A and 8B, paragraph 9(4)(ab), sections 10, 10A and 11, subsections 11A(1) and (5), sections 14 to 18 and subsection 19(8);
- subsection 31(1); and
- those in Part IV, except section 34, subsections 35(7) and (7A) and paragraph 35A(3)(a).

The provisions will apply, unless the contrary intention appears, as if any reference in those provisions to the CO were a reference to the PIO and any reference to "a Department", "a prescribed authority" or "a Department or a prescribed authority" were a reference to Australia Post or a registered PPO. They will apply as if a reference in any of those provisions to an officer were a reference to an officer within the meaning of officer in proposed Part IIB and a reference in any of those provisions to a principal officer were a reference to a principal officer within the meaning of Part IIB. ("Officer" and "principal officer" for the purposes of proposed Part IIB are defined in proposed section 19G).

Proposed subsection (4) contains a table which explains how certain provisions in the Ombudsman Act will apply in relation to the PIO. By operation of the table:

- subsection 7A(1) will apply as if a reference to "paragraph 5(1)(b)" were a reference to proposed paragraph 19M(2)(b)
- subsection 11A(4) will apply as if a reference to "the Minister" were a reference to the Minister administering the Ombudsman Act (currently the Prime Minister) and the Minister administering the *Australian Postal Corporation Act 1989* (currently the Minister for Communications, Information Technology and the Arts);
- subsections 12(4) and (5) will apply as if a reference in those subsections to section 15 were a reference to proposed section 19V;
- subsection 35(6A) will apply as if it a reference to paragraph 6(4A)(e) or (4D)(e) were a reference to proposed paragraph 19P(3)(b);
- subsection 35B(2) (paragraph (a) of the definition of ***listed disclosure method***) will apply as if a reference to Division 2 of Part II were a reference to proposed section 19V, 19W or 19X; and
- subsection 35B(2) (paragraph (b) of the definition of ***listed disclosure method***) will apply as if a reference to section 6 or 6A were a reference to proposed section 19N or 19P.

Proposed subsection 19R(5) provides that, for the purposes of Part IIB, subsection 3(6) applies in relation to the PIO as if a reference in that subsection to a prescribed authority were a reference to Australia Post.

The effect of the application of proposed subsections 19R(3) and (4) is explained separately for each provision below.

**APPLICATION OF CURRENT PROVISIONS OF THE OMBUDSMAN ACT TO THE PIO**

The explanations below set out the provisions of the Ombudsman Act which apply to the proposed PIO and explain their application. Those provisions which are not applied by cross-reference are not applicable to the PIO.

**Subsection 3(1)**

This subsection contains definitions. The definitions apply to the PIO subject to any contrary intention set out in Part IIB. So, for example, the definitions of "officer" and "principal officer" contained in subsection 3(1) will not apply for the purposes of Part IIB. These terms are defined separately in proposed section 19G. Nor will the definition of "Ombudsman" apply. For the purposes of Part IIB, a reference to "Ombudsman" is to be taken to be a reference to the PIO (see proposed paragraph 19R(2)(a)). Similarly, the definitions of a Department or prescribed authority will not apply and, instead, any reference to a Department of prescribed authority is to be taken to be a reference to Australia Post or a registered PPO (see proposed paragraph 19R(2)(b).

**Subsection 3(7)**

Subsection 3(7) defines the meaning of "taking of action". Where it occurs in the Ombudsman Act "taking of action" means to make, or fail or refuse to make, a decision or recommendation, or to formulate, or fail or refuse to formulate, a proposal or to fail or refuse to take any action.

**Subsection 3(8)**

This subsection explains that the expression, "international relations of the Commonwealth", where it occurs in the Ombudsman Act is a reference to the Commonwealth's relations with any other country or an international organisation.

**Section 3B**

This section excludes all ACT enactments and other specified legislation from the meaning of "enactment" for the purposes of the Act. The following are excluded:

- *Australian Capital Territory (Self-Government) Act 1988*;
- *Canberra Water Supply (Googong Dam) Act 1974*; and
- Part IV, section 29 and 30, subsection 63(2), section 66 and Division 5 of Part X of the *Australian Capital Territory Planning and Land Management Act 1988*.

Subsections (4) and (5) provide that where the whole of an Ordinance or Act is not an enactment, instruments made under them are not enactments. Similarly, where part of an Act or Ordinance is not an enactment, an instrument made under the Ombudsman Act or Ordinance is not an enactment unless it was made for the purposes of the other part of the Ombudsman Act or Ordinance.

**Section 3C**

Section 3C provides that the PIO scheme will apply within and outside Australia and in every external Territory.

**Section 3D**

Section 3D provides that chapter 2 of the Criminal Code applies to all offences against the Ombudsman Act and will therefore apply to the offences set out in section 36.

**Subsections 6(1A) to (1C)**

The provisions in section 6 have the effect of ensuring that the PIO's resources are not expended unnecessarily in investigating actions when other avenues may be available to a complainant to resolve matters.

Under subsection (1A) the PIO has a discretion not to investigate an action taken by Australia Post or a registered PPO until the complainant first complains directly to Australia Post or the registered PPO.

Where the complainant has done so, the PIO may still decide not to investigate until the complainant informs the PIO that no redress has been granted or that the redress granted is inadequate.

Subsection (1C) provides that, subject to subsections (2) to (4), the PIO must investigate where no redress has been granted and the PIO believes that a reasonable period has elapsed during which redress could have been granted or, if redress has been granted, the PIO believes that it was inadequate.

**Subsections 6(2) to 6(4)**

These subsections provide that unless there are special reasons to justify the PIO's doing so, the PIO must not investigate a complaint if the complainant has already exercised, or exercises, a right to seek review by a court or by a tribunal established under an enactment.

If the complainant had a right to seek review by a court or tribunal of the action relating to a complaint and did not do so, the PIO may decide not to investigate the action or not to investigate the action further. The PIO can only so decide if he or she believes that, in all the circumstances, it would be, or would have been, reasonable for the complainant to exercise the right to have the action reviewed by the court or tribunal.

Similarly, if the PIO forms the view, before or after beginning to investigate an action, that an administrative practice provides adequately for review of the action, the PIO

may decide not to investigate the action or not to investigate it further. The PIO can only make such a decision if:

- the action has already been, or is being, reviewed under the administrative practice as a result of a request of the complainant; or
- the PIO believes that the complainant is entitled to have the action reviewed under the administrative practice and it would be reasonable for the complainant to do so.

**Subsection 6(5)**

This subsection deems complaints made by a person who is acting as an agent of another person or body to have been made by the person or body who requested that the complaint be made.

**Section 7 - Complaints**

This section sets out how to make a complaint to the PIO. Although a complaint may be made to the PIO either orally or in writing, the PIO may at any time reduce a complaint to writing or require the complainant to do so. If the PIO asks the complainant to reduce the complaint to writing and he or she refuses to do so, the PIO may refuse to investigate the complaint, or investigate it further, until the complainant complies with the request.

Subsections 7(3) and (4) explain the rights of a person in custody to make a complaint and receive correspondence from the PIO. A person in custody (a detainee) has the right to ask the person detaining him or her or another person who has duties in relation to his or her detention, to provide the detainee with the facilities to complain in writing to the PIO, have any subsequent information about the complaint sent to the PIO and have the complaint or any further information sent to the PIO in a sealed envelope. A detainee also has the right to receive, without undue delay, any sealed envelope addressed to him or her by the PIO that comes into the possession of the person holding him in custody or performing duties for the person who is holding the other in custody. Persons holding another in custody do not have the right to open a sealed letter from the PIO to the detainee or from the detainee to the PIO.

For the purposes of identifying and delivering sealed correspondence to detainees the PIO may make special arrangements with the appropriate authority of a State or Territory. It is noted that the operation of section 7 is affected by section 193 of the *Migration Act 1958* (referred to in Part 2 of Schedule 1 to the Bill).

**Section 7A – Preliminary inquiries**

Where a complaint is made to the PIO, this section allows the PIO to make inquiries of the principal officer of Australia Post or a registered PPO to determine whether he or she is authorised to investigate the action or, if authorised, to decide not to investigate the complaint. Similarly, if the PIO thinks he or she is authorised to investigate action taken by Australia Post or a registered PPO under proposed paragraph 19M(2)(b**)** he or she may make inquiries of the principal officer of Australia Post or a registered PPO to decide whether to exercise his or her discretion not to investigate.

The PIO may make an arrangement with the principal officer of Australia Post or a registered PPO setting out the officers of whom the PIO may make all inquiries, or inquiries included in a class or classes of inquiries.

**Section 8 – Investigations**

Proposed section 19R applies subsections 8(1) to 8(7) and paragraph 8(7A)(a).

Section 8 sets out the manner and process of conducting investigations. The powers set out in section 8 may be exercised by the PIO at any time during an investigation, including before the commencement of an investigation or after completion.

Section 8 requires the PIO to inform the principal officer of Australia Post or a registered PPO that an action is to be investigated, prior to commencing the investigation.

The PIO may make an arrangement with the principal officer of Australia Post or a registered PPO to provide for the manner in which and the period within which the PIO is to inform the principal officer that he or she proposes to investigate action that is included in a class or classes of actions specified in the arrangement.

Subject to the Ombudsman Act, investigations can be conducted in any way the PIO thinks fit but must be conducted in private.

Subject to the Ombudsman Act the PIO has a wide discretion to obtain information from such persons and make such inquiries as he or she thinks fit.

The PIO does not have to allow a complainant or any other person to appear before him or her in connection with an investigation. However, the PIO is subject to special obligations if he or she expressly or impliedly criticises Australia Post or a registered PPO in a report in respect of an investigation. In such cases, before completing the investigation the PIO must afford the principal officer of Australia Post or the registered PPO and the officer principally concerned in the investigation opportunities to appear before him or her, or before an authorised person, to make submissions, either orally or in writing about the action and, if the opinions are about a person, allow the person to do the same.

If the principal officer of Australia Post or a registered PPO is afforded the opportunity of an appearance, the principal officer may appear in person or authorise someone else to appear on his or her behalf. A person other than a principal officer who is afforded a

right of appearance may, with the approval of the PIO or the person authorised by the PIO, be represented by another person at the appearance.

Where, in relation to an investigation, the PIO proposes to give a person the opportunity to appear before him or her, or before an authorised person, and to make submissions under subsection 8(5), or proposes to require the person to produce information or documents under section 9, the complaint must be reduced to writing, if it was made orally.

**Section 9 – Power to obtain information and documents**

Subsection 9(1) gives the PIO the power to require a person, whom he or she believes capable of providing information or producing documents or other records relevant to an investigation under the Act, to provide the information or produce the documents or other records at a place and within a time, or on a date and at a time, specified by notice in writing, served on the person. The information must be provided in writing to the PIO, signed by the person if the notice was served on an individual and signed by an officer of the body corporate, if the notice was served on a body corporate.

Subsection 9(1AA) addresses the situation where the PIO believes that an officer of Australia Post or a registered PPO has information or documents or records relevant to an investigation but the PIO does not know the identity of that officer. In such cases, the PIO may serve a notice on the principal officer of Australia Post or the registered PPO requiring that principal officer, or a person nominated by the principal officer, to attend at the place and within the period or on the specified date and at the time specified in the notice. The person on whom the notice is served must appear before the person specified in the notice to answer questions relevant to the investigation or to produce to the person specified in the notice such documents or other record as are specified.

Subsection 9(1A) gives the PIO the right to take possession of documents and records produced to him or her under subsection 9(1) or 9(1AA), or an order under subsection 11A(2), and to copy them, take extracts from them and to retain them as long as necessary for the purposes of the investigation. However, the PIO must allow a person who would be entitled to inspect the documents or records, if they were not in his or her possession, to inspect them at all reasonable times.

Subsection 9(2) allows the PIO to serve a notice on a person whom he or she believes is able to give information relevant to an investigation under the Ombudsman Act, requiring them to attend before a person specified in the notice at a specified date, time and place, to answer questions relevant to the investigation.

Subsection 9(3) imposes limits on the PIO's powers to require a person to provide information, answer questions or produce documents or records where the Attorney-General gives the PIO a certificate certifying that the disclosure of the information or documents would be contrary to the public interest. The provision has effect where the Attorney-General certifies that the disclosure would be contrary to the public interest because it would:

- prejudice the security, defence or international relations of the Commonwealth;

- involve disclosure of confidential communications between a Minister and Minister of a State that would prejudice relations between the Commonwealth Government and the Government of a State;
- involve disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;
- involve disclosure of deliberations or advice of the Executive Council; or
- if the documents were in the procession or under the control of the Australian Crime Commission (ACC) or Board of the ACC, endanger the life of a person or create a risk of serious injury to a person.

Subsection (4) sets out situations where provisions of other enactments will not excuse a person from providing information or producing a document or record or answering questions when required to do so under the Ombudsman Act on any of the following grounds that:

- it would contravene the provisions of any other enactment (whether it was enacted before or after the commencement of the *Prime Minister and Cabinet Legislation Amendment Act 1991*);
- it might tend to incriminate the person or make him or her liable to a penalty; or
- disclosing the information or providing the document would be otherwise contrary to the public interest.

However, the information or document or record or answer to a question is not admissible in evidence against the person in proceedings except in the following situations:

- in an application under subsection 11A(2) to the Federal Court for an order directing a person to comply with a requirement made by the PIO to provide information, produce documents or records and answer questions in relation to an investigation; or
- in proceedings for an offence against section 36 of the Ombudsman Act (i.e. refusing or failing to attend before the PIO, or be sworn or make an affirmation or furnish information or answer a question or produce a document or record) or offences against section 137.1, 137.2 or 149.1 of the Criminal Code that relates to the Act.

The fact that a person is not excused from doing these things does not affect a claim of legal professional privilege that anyone may make in relation to the information, documents or records (subsection (5A)). Subsection (5) provides that a person is not liable to a penalty under any other enactment for refusing to provide information, produce a document, or record or answer questions when required to so under the Act.

The effect of subsection (6) is that the reference in subsection (1) to an officer in relation to a registered PPO that is a body corporate includes a reference to a director, secretary, executive officer or employee of the body corporate.

For the purposes of section 9 “State” includes the Australian Capital Territory and the Northern Territory.

**Subsections 11A(2) to 11A(4) – Powers of Federal Court of Australia**

These provisions strengthen the PIO's ability to obtain information or documents necessary to the conduct of an investigation where a person fails to respond to a request from the PIO.

The PIO can make an application to the Federal Court of Australia (upon which jurisdiction is conferred for the purposes of section 11A by operation of subsection 11A(3) of the Act) but only if he or she first informs the Minister administering the *Ombudsman Act 1976* and the Minister administering the *Australian Postal Corporation Act 1989* in writing of his or her reasons for doing so.

An application may be made for an order directing a person who has failed to respond to a notice served on him or her under section 9 to provide information, produce documents or other records or to attend before the PIO to answer questions, as he or she was required to do by the notice.

**Section 12 – Complainant and Department etc. to be informed**

This section imposes obligations on the PIO to inform parties about the outcome of an investigation.

If the PIO does not investigate, or continue to investigate, an action taken by Australia Post or a registered PPO which is the subject of a complaint, the PIO must inform the complainant as soon as practicable, and in any manner the PIO thinks fit, that he or she has decided not to investigate, or not to continue investigating the action and the reasons for his or her decision.

An exception to the requirement to inform Australia Post or a registered PPO is provided in subsection 12(2). The exception applies where the PIO has made an arrangement with Australia Post or a registered PPO about actions in relation to which complaints have been made to the PIO, where the actions were actions taken by Australia Post or a registered PPO that are included in a class or classes of actions specified in the arrangement. Such arrangements may set out the manner in which, and the period within which, the PIO has to inform Australia Post or a registered PPO of his or her decision not to investigate or continue to investigate actions and the reasons for his or her decision. An arrangement may also provide that the PIO is not required to inform Australia Post or a registered PPO of his or her decision not to investigate or continue to investigate actions or the reasons for his or her decision.

Subsections (3) and (4) explain that the PIO must give Australia Post and registered PPOs details of the investigation of an action, which was the subject of a complaint, when the investigation is completed. The PIO can provide this information in a way, and at the times, he or she thinks fit. The PIO also has a discretion to give suggestions or comments relating to, or arising from, an investigation that he or she has carried out, to Australia Post or a registered PPO, or to a body or person.

Subsection (5) provides that, if the PIO gives a report containing recommendations about action which has been the subject of a complaint to Australia Post or a registered PPO under proposed section 19V, and the PIO considers that action that is adequate and appropriate is not taken in relation to the recommendations within a reasonable time, the

PIO must give the complainant a copy of the recommendations and any comments he or she thinks appropriate. In any other case, the PIO may give the complainant a copy of the recommendations and any comments he or she thinks fit.

**Section 13 - Power to examine witnesses**

Where the PIO requires a person to attend before him or her in the exercise of his or her powers under section 9 of the Act, the PIO may administer an oath or affirmation to the person and examine the person on oath or affirmation.

Where the PIO serves a notice on a person (the respondent) under subsection 9(2) of the Act, requiring the respondent to attend before the person specified in the notice, the person before whom the respondent is required to attend may also administer an oath or affirmation to the respondent and examine him or her on oath or affirmation.

**Section 19 - Annual report and additional reports to Parliament**

The PIO is subject to mandatory annual reporting requirements. The PIO also has a discretion to submit reports to the Minister administering the Ombudsman Act (currently the Prime Minister) for tabling in Parliament. This discretionary power allows the PIO to bring attention to the PIO's activities, and thereby discourage actions considered undesirable.

The PIO must submit to the Minister administering the Ombudsman Act as soon as practicable, but at least within 6 months after 30 June each year, a report on the PIO's activities for the year ending on 30 June. The PIO also has a discretion to submit reports to the Minister, from time to time, for tabling in Parliament. The reports may cover the PIO's operations for part of a year or matters related to, or arising out of the PIO's performance of functions or exercise of powers under the Act.

If the PIO gives the Minster a report under subsections (1) or (2), the Minister must have the report tabled in both Houses of Parliament within 15 sitting days of receiving it.

If the PIO believes he or she cannot submit a report under subsection (1) within 6 months after 30 June of that year, the PIO may, within that 6 month period ask the Minster for an extension of time. If the PIO asks for an extension of time, the PIO must provide a statement of reasons to the Minister explaining why he or she will not be able to submit the report. The Minister may grant any extension he or she considers reasonable.

However, if the Minister grants the PIO an extension, within three sitting days of granting the extension the Minster must table before each House of Parliament a copy of the PIO's statement of reasons, a statement specifying the extension granted and the reasons for granting the extension.

The PIO must then submit the report within the extended period and the Minister must table it before both Houses of Parliament within 15 sitting days of receiving it.

If the PIO fails to submit a report within 6 months after 30 June in a particular year or fails to submit a report within a period extended by the Minister under subsection 19(7), the PIO must explain to the Minister in writing why the report was not submitted and the Minister must table a copy of the statement before each House of Parliament within 3 sitting days of receiving it.

**Subsection 31(1) – Staff**

Staff who are required for the purposes of the Ombudsman Act are persons engaged under the *Public Service Act 1999.*

## Part IV - Miscellaneous

**Section 33 – Ombudsman not to be sued**

Subject only to the obligations imposed on the PIO under section 35 of the Ombudsman Act to observe confidentiality, section 33 provides statutory immunity from an action, suit or proceeding for the PIO (including a delegates of the PIO and persons acting under the direction or authority of the PIO) in relation to anything done or omitted to be done in good faith in the service of, or purported exercise of, any powers or authority conferred by the Act.

**Section 35 – Officers to observe confidentiality**

Section 35 imposes obligations on "officers" to keep certain information confidential. For the purposes of section 35, an "officer" may include a person who is a member of the PIO's staff or a member of the PIO's staff to whom the PIO has delegated his or her powers under proposed subsection 34(2A) or a person who is an authorised person.

Subsection 35(2) is an offence provision for the breach of which a penalty of $500 applies. Subject to section 35, it is an offence to make a record of, reveal or pass on to anyone, either directly or indirectly, information acquired as an officer which was obtained under the provisions of the Ombudsman Act. The offence applies while a person is an officer and after a person ceases to be an officer.

Despite subsection 35(2), an officer may divulge, or communicate to another, information provided by an officer of Australia Post or a registered PPO with the consent of the principal officer of Australia Post or the registered PPO. An officer may also disclose information provided by a person other than a person who is an officer of Australia Post or registered PPO with the consent of that person.

The PIO may give information to another statutory office holder when transferring a complaint (see subsection 35(6A)).

The offence provision does not prevent the PIO from disclosing matters he or she thinks should be disclosed in a report under the Act, when setting out grounds for conclusions and recommendations made in the report. However, such disclosure is prohibited if the Attorney-General provides a certificate to the PIO stating in writing that the disclosure of information or documents about a specified matter or matters included in a class of

specified matters or the disclosure of a specified document or documents included in a specified class of documents would, for a reason specified in the certificate, be contrary to the public interest. The reason specified in the certificate must be one of those set out in paragraphs 9(3)(a), (b), (c), (d) or (e).

Subsection 35(2) also applies to prevent an officer from disclosing information acquired under the provisions of the Ombudsman Act concerning any of the matters set out in paragraphs 9(3)(a), (b), (c), (d) or (e) . Subsection 35(5) does not prevent an officer, in the performance of duties from disclosing the information to another officer, or the contents, copy or extract of such documents to another officer or, if returning the document, to the person lawfully entitled to it.

The maximum penalty for disclosing information or documents in contravention of subsection 35(5) of the Ombudsman Act is 2 years imprisonment.

Subsection 35(8) makes it clear that a person who is, or has been, an officer cannot be compelled to disclose information acquired through being, or having been, an officer. The provision applies to a court (whether or not the court exercises federal jurisdiction). It also applies to a person authorised by a law of the Commonwealth or of a State or Territory or by consent of the parties to hear, receive or examine evidence.

**Section 35A – Disclosure of information by PIO**

Section 35A sets out when the PIO may disclose information. In particular, it clarifies that nothing in the Ombudsman Act precludes the PIO from disclosing information or making a statement to a person, the public or a section of the public, about the performance of the functions of, or an investigation by, the PIO under the Ombudsman Act about those matters, if the PIO considers that it is in the interests of Australia Post, a registered PPO or person or it is in the public interest to disclose the information or make the statement.

However, the PIO must not disclose information or make a statement if doing so is likely to interfere with carrying out an investigation or making a report under the Act. Further, in disclosing information or making a statement under subsection 35A(1) of the Ombudsman Act about a particular investigation, the PIO must not disclose the name of a complainant or any other matter that would allow the complainant to be identified, unless it is reasonable in the circumstances to do so.

Subsection 35A(4) provides that section 35A has effect despite the requirement in subsection 8(2) to conduct investigations in private and the requirement in section 35 to observe confidentiality. However, it does not override the requirement in subsection 35(5) to keep confidential matters of public interest in respect of which the Attorney-General has issued a certificate.

**Section 36 – Offences**

This section lends force to the PIO's powers by making it an offence punishable on conviction by a fine of up to $1,000 or imprisonment for up to 3 months to refuse to appear or fail to appear before the PIO to be sworn or to make an affirmation or answer questions or produce a document or record when required to do so under the Act, unless

the person has a reasonable excuse for not doing so. If a defendant mounts the latter defence, the defendant bears the evidential onus of proving the defence.

**Section 37 – Protection from civil actions**

This section facilitates the operation of the Ombudsman Act by providing immunity from civil suit for persons who, in good faith, complain to the PIO or make a statement or give a document or information to a person who is an officer within the meaning of section 35 of the Act, if the information or document is given for the purposes of the Act. The protection applies even if the statement was not made or the document or information was not given in response to a requirement made under section 9 or an order under section 11A of the Act.

**Section 38 – Regulations**

Section 38 provides that the Governor-General may make regulations prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the Ombudsman Act and in particular, prescribing matters in connection with fees and expenses of witnesses appearing before the PIO.

There will be a need to make regulations for the purposes of prescribing fees and expenses for witnesses appearing before the PIO and for prescribing methods to be used in working out the amount of a fee and for prescribing a time by which a fee is due and payable. One or more methods may be prescribed for the purposes of calculating a fee (see proposed 19ZE).

**THE EXPLANATION BELOW RELATES TO PROPOSED NEW SECTIONS TO BE INSERTED INTO THE OMBUDSMAN ACT BY THE POSTAL INDUSTRY OMBUDSMAN BILL 2005 WHEN IT IS ENACTED**

**Proposed section 19S - Powers of the Postal Industry Ombudsman under section 9**

Section 9 of the Ombudsman Act provides that the CO can exercise his or her powers to obtain information and documents in relation to the investigation of a complaint. Proposed section 19S enables the PIO to obtain information before and after the investigation of a complaint as well as during the investigation. The PIO will, for example, be able to use the powers to decide whether or not to investigate, to start or continue an investigation or report in relation to an investigation.

The proposed subsection sets out the purposes for which the PIO may exercise his or her powers under section 9. These purposes are:

- to determine whether he or she may investigate action under Part IIB – this involves a determination of whether or not the PIO has jurisdiction;
- to decide whether or not to investigate action, or to investigate action further, under Part IIB – this involves a decision about whether or not to take action to investigate an action or to investigate it further;
- to start or further the conduct of an investigation – this involves taking the action to start or further an investigation;

- to prepare a report in relation to an investigation – this involves deciding whether or not a report is warranted; and
- to find out what action has been taken by Australia Post or a registered PPO after the PIO has exercised a power under section 9. The PIO can only exercise a power to do this if the PIO has already exercised a power for any of the purposes mentioned above.

Despite the fact that section 8 is headed "Investigations", there is nothing in the text of the provisions conferring the powers under section 8 which would support an interpretation that the powers in section 8 cannot also be used for the purposes set out in section 9.

**Proposed section 19T - Duty to accord procedural fairness**

The hearing rule in subsection 8(5) of the Ombudsman Act will still apply if the PIO expresses a critical opinion of a person in a report in relation to an investigation.

In addition, proposed section 19T provides that the common law rules of procedural fairness are to apply generally to the PIO in the exercise of any of his or her powers under the Act. The new provision notes examples of how procedural fairness should be applied. The first of these notes that if the PIO sets out a critical opinion in a report under proposed section 19V, he or she must provide that person with an opportunity to respond to the criticism (subsection 8(5)). The second notes that if the PIO sets out a critical opinion of a person in disclosing information under subsection 35A(1) or referring to an investigation in a report under proposed section 19X, he or she must accord the person procedural fairness.

**Proposed section 19U – Disclosure of identifying information**

This provision is intended to protect the confidentiality of complainants.

Proposed subsection 19U provides that, in making a report under proposed sections 19V and 19X, the PIO must not disclose the name of a complainant or any information which would enable the identification of a complainant unless it is fair and reasonable to do so.

**Proposed section 19V - Postal Industry Ombudsman may report to Australia Post or registered PPO**

Proposed section 19V requires the PIO to report to an investigated body after the completion of an investigation if:

- the PIO forms the view that the action taken by the investigated body seems to have been contrary to law, was unreasonable, unjust, oppressive or improperly discriminatory or otherwise wrong in all the circumstances; and
- the PIO is of the opinion that something could have been done in relation to an action taken (for example, some action could have been taken by the investigated body to mitigate or alter the effects of an action or a policy or

practice on which the action was based should be altered or that reasons should have been given for the action taken.)

The PIO must include in the report his or her reasons for the opinions expressed in the report and may also include in the report any recommendations he or she thinks fit to make.

The PIO may ask the investigated body to provide, within a specified time, particulars of any action proposed to be taken in response to the matters set out in the PIO's report. The investigated body may give the PIO comments on the report. The PIO must give a copy of the report and any comments the investigated body has made to the PIO about the report to the Minister administering the *Australian Postal Corporation Act 1989.*

**Proposed section 19W - Minister to table certain reports in Parliament**

This section provides the means for ensuring that consequences attach to the failure of Australia Post or a registered PPO to take action within a reasonable time in relation to matters and recommendations included in the PIO's report made under proposed section 19V.

If the body which was investigated (i.e. Australia Post or a registered PPO) does not take action that the PIO considers adequate and appropriate in the circumstances, the PIO may ask the Minister administering the *Australian Postal Corporation Act 1989* to table copies of the report before each House of Parliament. If so requested, the Minister must, within 15 sittings day after receipt of request, table copies of the report, along with any comments made by the body under subsection 19V(5).

**Proposed section 19X – Annual reports**

This section reiterates that the PIO, in relation to the provision of annual reports, has the same functions and duties as the CO has under section 19 except that those powers and duties do not include the powers and duties of the CO relating to the Australian Capital Territory.

In accordance with item 21 of Schedule 1 to the Bill, the first annual report to be provided by the PIO under this section must relate to the period beginning on the date of commencement of Part IIB and ending on the following 30 June.

The CO is required by section 19 to produce an annual report. The PIO's report about his or her operations during a year may be included in the CO's report under section 19.

Proposed subsection 19X(4) sets out the matters the PIO must include in his or her report. These are:

- the number of complaints received by the PIO under Part IIB during the year;
- the number of investigations about complaints started and ended during the year;
- the number of investigations initiated by the PIO which were started and completed during the year;

- details of the circumstances and number of occasions the PIO has required information or documents to be provided under section 9 during the year;

- details of the circumstances and occasions during the year where the PIO has exercised the discretion under section 19N(3) to deal with, or continue to deal with, a complaint or part of a complaint as the CO;

- details of recommendations made during the year in reports under section 19V about particular actions that should be taken, about policies or practices that should be altered or anything that should be done in relation to an action that has been investigated and statistical information about such actions.

**Proposed section 19Y - Postal Industry Ombudsman may notify employer of misconduct**

The section applies in circumstances where the investigation of an action by the PIO identifies misconduct on the part of an officer of Australia Post or a PPO. In these circumstances, the proposed section provides that if the evidence of misconduct is sufficiently compelling to justify his or her doing so, the PIO may bring the misconduct to the attention of the Minister administering the *Australian Postal Corporation Act 1989* if the person is the principal officer of Australia Post; to the principal officer of Australia Post, if the person is an officer of Australia Post but not its principal officer; and to the principal officer of the PPO, if the person is an officer of a registered PPO.

**Proposed section 19Z – Limitation on liability where information or documents provided in good faith or when required to do so**

Subsection 19Z(1) provides statutory protection to a person who has, in good faith, given information, a document or other record to the PIO in relation to the PIO's functions or powers.

Subsection 19Z(2) is an avoidance of doubt provision which clarifies that subsection 19Z(1) does not prevent a person from being liable to a proceeding or being subject to a liability for conduct of the person that is revealed by the information, document or record given to the PIO. In combination, these subsections are intended to encourage people to provide information on a voluntary basis while at the same time ensuring that this provision is not used to avoid liability for any conduct revealed by the information.

Section 19Z does not limit the immunity from civil suit provided by section 37. Section 37 protects a person from actions for loss, damage or injury of any kind suffered by another person as a result of the making of a complaint to the PIO under the Ombudsman Act or making a statement, giving information or a document to a person, whether or not the statement was made or the information given because it was required to be given by the operation of section 9 or section 11A. The immunity only applies if the complaint was made or the statement, information or document was given, in good faith.

## Division 4 – Register of PPOs

**Proposed section 19ZA – Registration of PPOs**

Proposed section 19ZA requires the PIO to establish and maintain a register of PPOs. It also explains the process for registration of a PPO under the Ombudsman Act for the purposes of being subject to the PIO's jurisdiction. A PPO that decides to register voluntarily need only make an application in writing to the PIO to be registered. PPOs that comprise 20 or more employees and have an annual turnover threshold greater than $1,000,000 must apply in writing to the PIO to be registered.. If the PIO receives an application in writing from a PPO (PPOs are defined in subsection 3(1) of the Act) to be registered, the PIO must enter the name of the PPO on the Register of PPOs. A PPO is registered for the purposes of coming within the jurisdiction of the PIO from the time that the PIO includes the PPO on the Register.

**Proposed section 19ZB – Information to be included in Register**

The PIO must include in the register the name of the PPO, the PPO's ABN (as defined in section 41 of the *A New Tax System (Australian Business Number) Act 1999*), if it has one, and the date on which the PPO was included in the Register.

If any of the information about the PPO which is included on the register changes, the PPO must notify the PIO of any changes.

**Proposed section 19ZC – Deregistration of PPOs**

If a PPO no longer wishes to be registered for the purposes of the PIO provisions, the PPO may apply in writing to the PIO to be no longer registered.

The date on which the PIO receives an application for deregistration from a PPO is known as the deregistration date. If the PIO receives an application for deregistration from a registered PPO to be no longer registered, the PIO must enter the deregistration date for the PPO in the register. The PPO will remain on the register for 12 months from its deregistration date, after which time the PIO must remove the PPO from the register. The PPO is taken to be no longer registered for the purposes of the Part IIB of the Act from the deregistration date.

The Note below proposed section 19ZC explains that even though a PPO is no longer registered for the purposes of Part IIB, it may still be treated as a registered PPO. For example, under proposed section 19J of the Act, the PIO still has jurisdiction in relation to a complaint about an action of a PPO, if the complaint relates to an action of the PPO taken while the PPO was registered and the complaint was made to the PIO within 12 months of the deregistration date.

**Proposed section 19ZD – Register to be maintained by electronic means**

To take account of current technologies, the Register may be maintained by electronic means and is to be made available for inspection on the Internet.

## Division 5 – Fees for investigations

**Proposed section 19ZE – Fees for investigations**

The costs of the PIO will be recovered from Australia Post and PPOs who register with the scheme and in relation to whom investigations have been completed. These costs are in addition to funds which are already appropriated for the purposes of the CO to investigate actions taken by government agencies prescribed for the purposes of the Ombudsman Act.

The costs of the PIO will be identified by means of an annual Ministerial determination. This will be the maximum amount which can be recovered from Australia Post or registered PPOs. The amount payable by each postal operator will be recoverable in arrears after the end of each financial year and will depend on the number of complaints investigated about each operator and the complexity of the complaints during that year. The detail of the mechanism for attributing costs will be prescribed in the regulations.

The body responsible for collecting the fees from Australia Post and registered PPOs will be the ACA which already has considerable experience in the collection of fees from telecommunications operators.

Proposed section 19ZE allows the PIO to charge Australia Post or a registered PPO fees for an investigation that it has conducted under paragraph 19M(2)(a). No fees are charged where the PIO exercises his or her discretion to investigate an action under proposed 19M(2)(b).

The Note following proposed subsection (1) draws attention to the fact that a PPO that is no longer registered may still be treated as a registered PPO and therefore be charged fees in respect of an investigation, if a complaint is made about actions it took while registered and the complaint was made within 12 months of the action occurring.

Proposed subsection (2) imposes a limit on the amount of fee that can be charged for an investigation. The amount must not be more than the amount which in the PIO's opinion represents the costs incurred by the PIO in conducting the investigation and must not be such as to amount to taxation.

Proposed subsection 19ZE(3) provides that the Minister administering the *Australian Postal Corporation Act 1989* may make a written determination specifying the total amount of fees that may be charged under this section in relation to investigations that the PIO completed during a specified financial year.

Proposed subsection 19ZE(4) clarifies that a determination made under subsection 19ZE(3) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Proposed subsection 19ZE(5) provides that if a determination is made under subsection 19ZE(3) for a financial year, the total amount of fees charged under proposed section 19ZE for investigations that the PIO completed during the financial year must not exceed the amount specified in the determination.

Proposed subsection 19ZE(6) provides that the regulations may prescribe one or more methods to be used in working out the amount of a fee and prescribe the time by which a fee is due and payable.

Proposed subsections (7) to (9) establish that the fees referred to in subsection (1) are a debt to the Commonwealth to be paid to the ACA on behalf of the Commonwealth. As soon as practicable, the ACA must bank fees in an official account as defined in the *Financial Management and Accountability Act 1997*.

**Item 12 – After subsection 34(2)**

Item 12 inserts a new subsection into the delegations provisions. Proposed subsection 34(2A) gives the PIO the power to delegate to a person generally, or as described in an instrument of delegation, all his powers or any of his powers under the Act, except that the PIO must not delegate his or her powers under proposed section 19V (power to report to an investigated body following an investigation), 19W (power to request the Minister to table reports about an investigated body where body has not taken adequate and appropriate action) and the powers referred to in proposed section 19X (powers relating to annual reports).

The delegation powers set out in section 34 of the Act and applied to the PIO by proposed subsection 34(2A) mirror those available to the CO and DFO and reflect the administrative arrangements within the office of the CO. While it is noted that broad delegation powers are not considered appropriate by the Senate Standing Committee for the Scrutiny of Bills, there are sound reasons for such powers. For example, the CO's office is relatively small and is geographically dispersed, and it is therefore impractical to limit investigatory powers to particular classes of officers (such as SES officers), as these officers are not present in every office. In addition, the CO will, on occasion, engage a consultant with specialist knowledge to investigate a matter, and will delegate power to the consultant.

**Items 13 and 14 – Subsections 34(3) and (4)**

The effect of the first of these amendments is to include the PIO in the deeming provisions in subsection 34(3) of the Act so that the exercise of a power by a delegate of the PIO is deemed to be an exercise of the power by the PIO for the purposes of the Act. The amendment to subsection 34(4) of the Act clarifies that the exercise of a power by a delegate of the PIO does not prevent the exercise of the power by the PIO himself or herself.

## Part 2 - Amendment of other Acts

This Part sets out consequential amendments to be made to other Acts.

***Migration Act 1958***

**Item 15 and 16 - Paragraph 193(3)(b) and subsection 193(3)**

Section 193 of the *Migration Act 1958* (the Migration Act) effectively prevents the Commonwealth Ombudsman or the Human Rights and Equal Opportunity Commission from initiating correspondence with a person in an immigration detention centre. Items 15 and 16 amend the Migration Act to extend the application of paragraph 193 to include the PIO. This will mean that the PIO cannot initiate correspondence with a person in an immigration detention centre.

***Privacy Act 1988***

Section 50 of the *Privacy Act 1988* (the Privacy Act) allows the Privacy Commissioner to transfer complaints to other agencies.

**Items 17, 18 and 19**

These items amend the Privacy Act to include a reference to the PIO. The amendments to the Privacy Act will allow the Privacy Commissioner to transfer complaints to the PIO if the Privacy Commissioner considers that the PIO could more conveniently or more effectively deal with the complaint and deem a complaint so transferred to be a complaint made to the PIO.

**Other Acts**

It is noted that the *Australian Crime Commission Act 2002* and the *Administrative Decisions (Judicial Review) Act 1977* refer to provisions of the Ombudsman Act that are being applied to the PIO by cross-reference. This is also the case in relation to the DFO. As there is no reference in these Acts to the application of provisions in the Ombudsman Act to the DFO, the Bill does not amend these Acts to include reference to the application of provisions in the Ombudsman Act to the PIO.

## Part 3 – Application and transitional provisions

**Item 20 - Application**

This provision explains that the proposed amendments in Part 1of Schedule 1 apply to actions taken by Australia Post or a registered PPO after Part 3 of Schedule 1 commences. Schedule 1 will commence on a day to be fixed by proclamation or if it has not commenced within 6 months of the Bill receiving the Royal Assent, it will commence after the end of that period.

The proposed amendments made to subsection 50(2) and paragraphs 50(2)(a) and 50(3)(a) of the *Privacy Act 1988* apply to complaints made after Part 3 of Schedule 1 commences.

**Item 21 – Transitional – reports under section 19X**

Proposed section 19X requires the PIO to produce annual reports about his or her activities. This provision explains what happens during the first year of the PIO's operations. The PIO's first annual report will relate to the period from the date of commencement of Part 3 of Schedule 1 to the period ending on the day on which 30 June first occurs after commencement.

# Schedule 2—Other amendments of the Ombudsman Act

In drafting the Bill, a number of drafting errors have been found in the Ombudsman Act. Schedule 2 corrects these errors from the date they occurred.

**Item 1 - Subsection 3(1) (definition of *enactment*)**

This item corrects the reference, in the definition of "enactment" in subsection 3(1), to "section 3AA", so that the reference is to "section 3B". Section 3AA of the Act was renumbered as "section 3B" by an earlier amendment to the Act.

**Item 2 – Subsection 3(1) (paragraph (b) of the definition of *prescribed authority*)**

This item corrects an incorrect reference to "section 3AB" to "section 3A" in paragraph (b) of the definition of "prescribed authority" in subsection 3(1) of the Act. Subsection 3AB was renumbered section 3A in an earlier amendment to the Act.

**Item 3 – Subsection 19F(1)**

This item removes the reference to subsection 31(3) where it occurs in subsection 19F(1). There is no subsection 31(3) in the Act.

**Item 4 – Subsection 34(6)**

This item repeals subsection 34(6). This item is obsolete because it applies a reference to a provision which was repealed by Schedule 5 of the *ACT Self-Government (Consequential Provisions) Act 1988.*

**Item 5 – Subsection 35B(2) (paragraph (a) of the definition of *listed disclosure method***

This item corrects an incorrect reference to "Part 2" and replaces it by a reference to "Part II".