

15 May 2009

Serena Beresford-Wylie
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Dear Ms Beresford-Wylie

Enquiry into Alternative Dispute Resolution and Civil Proceedings

I am writing to provide a brief submission to the above Enquiry, and in response to the Issues Paper released by the National Alternative Dispute Resolution Council.

Public Transport Ombudsman

In the Issues Paper – Summary you ask that details about our organisation be included in our submission.

A description of our scheme

The Public Transport Ombudsman Ltd is an industry dispute resolution scheme. We deal with complaints and disputes between commuters and others affected by public transport services in Victoria, and public transport operators.

The Public Transport Ombudsman Ltd is a public company funded by public transport operators. The Ombudsman is the chief executive officer, and responsible for dealing with complaints and the day-to-day management of the scheme. The Board, made up of an equal number of consumer and industry directors with an independent Chairman, is responsible for overseeing the scheme and maintaining the Ombudsman's independence.

The Public Transport Ombudsman Ltd Charter ("the Charter") sets the objectives of the scheme as '*providing a cost-free, efficient, fair, informal and accessible alternative to other remedies, such as court proceedings*' for public transport users and other affected by public transport services. The Charter provides for the functions of the Ombudsman, including:

- Receiving public transport complaints. This includes complaints about:
 - the provision or supply of, or the failure to provide or supply, public passenger transport services, including about over-crowding, service reliability and cancellations
 - ticketing, including ticket replacements and refunds, faulty tickets and ticket machines, and compensation requests
 - infrastructure and rolling stock, including about the cleanliness and condition of vehicles, stations and stops, disability access and safety issues

- the conduct of staff including authorised officers (ticket inspectors), such as use of force, rudeness, and poor advice or service
- the use of public transport land, including car parks, fencing, and litter or rubbish on rail land.
- Investigating and facilitating the resolution of the complaints where scheme members have been unable to resolve the complaints at first instance.
- Dismissing a complaint, or making a binding decision not exceeding the sum of \$5 000, where a complaint cannot be settled.
- Reviewing 'in jurisdiction' systemic issues and drawing these to the attention of scheme members and public transport regulators.
- Monitoring complaint trends and raising these as necessary with scheme members and public transport regulators.

The Charter specifically provides that the Ombudsman's functions do not extend to regulatory matters such as ticket prices, the adequacy of timetabled services, the content of government policies and matters required by law. In addition, the Ombudsman cannot deal with complaints already under consideration by any court or tribunal, or where this would involve reconsidering matters previously considered by a court or tribunal.

The Public Transport Ombudsman has adopted the [Benchmarks for Industry-Based Customer Dispute Resolution Schemes](#) ("the National Benchmarks"), issued by the Department of Industry, Science and Tourism, in providing our services. These include Benchmarks for accessibility, independence, fairness, accountability, efficiency and effectiveness.

The Public Transport Ombudsman is also a member of the [Australian and New Zealand Ombudsman Association](#) ("ANZOA"), a professional association of Ombudsmen and Chief Executives (or equivalent) of similar schemes or offices. ANZOA membership is premised on members meeting prescribed standards of independence, impartiality and effectiveness.

A description of our processes

Our services are provided using an alternative dispute resolution ("ADR") process we loosely refer to as '*shuttle conciliation*'.

The person making the complaint and public transport operator are usually not brought together during the conciliation process. Underlying our processes are principles of informality, timeliness, efficiency (including economy) and independence.

Receipt: The Public Transport Ombudsman accepts complaints by telephone, email, mail, fax or in person. We make available translator and TTY services as required. It costs a person nothing to make a complaint.

Investigation: The focus of our investigation is to facilitate a resolution of the issues raised in the complaint.

- First, we ask the person making the complaint for a full account of their issues, and to tell us what they want to resolve the complaint. During this process, if a person asks for an unrealistic outcome from their complaint, our conciliators may ask the person to reconsider their request prior to us seeking a response from the public transport operator. We will also ask the person to provide us with any

evidence (tickets, receipts, quotes, reports, witness names etc.) they have, or suggest that they may need to obtain specific information or evidence for our investigation.

- We then ask the operator to respond to the complaint and the resolution sought by the person making the complaint. This includes providing us with all documents created or relied upon in handling the complaint in the first instance. Where the operator does not meet the resolution sought by the person, we ask the operator for other suggestions which may resolve the complaint.
- Where necessary, we will seek additional information from third parties, about the issues of complaint, industry practice or other relevant matters. This may include researching these matters with other operators or in other jurisdictions.
- We assess the public transport operator's response, first to make sure all the issues are addressed, and second to form a preliminary view about whether the resolution offered is fair and reasonable. Sometimes we may go back to operators at this stage and ask that an additional resolution be considered, especially where we think this may resolve the complaint.

Resolution: The information and any resolution offered are then provided to the person who has made the complaint:

- where the person is satisfied with this information, we move to formally record the resolution of the complaint for both parties, and seek to have any agreed outcomes implemented
- where the person is not satisfied, we may either:
 - continue with the shuttle conciliation process where a further offer of resolution or new information is put
 - discontinue the investigation where the operator has put a fair and reasonable offer, or the complaint is not substantiated
 - make a binding decision.

Other dispute resolution tools: Our process can include:

- on-site conciliation meetings where we assess such a meeting will assist in the understanding of complaint issues and the resolution of the complaint
- face-to-face conciliation meetings where we believe this will assist in narrowing the issues of complaint and facilitate a resolution
- personal reviews by the Ombudsman where persons or operators are dissatisfied with the outcomes of their complaint.

A description of the outcomes achieved

Examples of outcomes achieved where matters are successfully resolved, include:

- explanations of events the subject of complaint or dispute
- apologies
- compensation – such as free tickets, reimbursements and monetary compensation
- training for staff, and other actions to redress conduct which causes complaints
- changes to the manner in which services are provided – including improved services for passengers, and tailored arrangements for passengers with special needs.

For operators, our process can help repair their relationship with a customer, provide finality for difficult issues and contribute to ongoing service improvements.

Specific questions asked in the Issues Paper

Chapter 2: Consistency in use of ADR terms:

2.1 To what extent is there a need for greater consistency in the use of ADR terms? How could this be achieved? What are the risks of greater consistency in the use of terms?

2.3 What are the advantages and disadvantages of adopting common process models for ADR processes, adopting standard definitions or adopting statutory definitions?

My view is that there are good reasons for there to be general agreement on what each of the various models of alternate dispute resolution mean. I am aware of the work of NADRAC in this area, and find the Glossary of Terms a useful touchstone in explaining the various ADR approaches.

In addition to the matters outlined at 2.23-4 of the issues paper, reasons for general agreement on the meaning of ADR terms include:

- where parties have a shared understanding of the process to be used at the outset of dispute resolution, they are more likely to have matching expectations about how the process will unfold, maximising the prospects of resolution.
- parties can prepare for the resolution process, and respond to requests made, with an increased understanding and confidence
- there are fewer prospects of unexpected surprises in the process that may impede effective resolution.

Our experience at the Public Transport Ombudsman is that it is very important for persons who make complaints in particular to understand our resolution processes, and the options available to progress their complaint. Where there is not a clear understanding, it leads to unrealistic expectations of the process and the outcomes which might be achieved.

However, in my view it is equally important that there remains flexibility in ADR processes. It is essential that an appropriate method is used to resolve disputes – one which meets parties' needs for economy (both financial and temporal) and finality, having regard to the matter in dispute and the likely outcomes that might be achieved. Imposing a rigid process in the name of complying with a standard and defined ADR process may frustrate the potential benefits that might be attained.

Use of the term Ombudsman

A separate but related issue is the use of the title 'Ombudsman' when describing complaint redress processes. A recent paper by John McMillan, the Commonwealth Ombudsman – [*What's in a name? Use of the term 'Ombudsman'*](#) – has highlighted the need to safeguard the term Ombudsman. The paper outlines that the term has become associated with independent, accessible and impartial review. This includes a high public awareness of the Ombudsman's role.

Professor McMillan notes a number of dangers, including public confusion and public deception, if the term is applied to a person or office that does not meet the Benchmarks for a genuine ombudsman scheme or office.

My strong view is that, in addition to consistent terminology to describe ADR processes, there should be close regulation of the use of the term Ombudsman.

Chapter 3: Promoting public awareness of ADR:

3.1 To what extent is there a need to improve the understanding of ADR and its differing processes in the general community? How might this be achieved?

3.2 Which other groups or organisations might benefit from a greater awareness of ADR? How might this be achieved?

One of the strengths of the National Benchmarks is the requirement on members of external dispute resolution schemes to promote awareness of the schemes.

Benchmark 1 – Accessibility – relevantly provides:

1.4 The scheme requires scheme members to inform their customers about the scheme.

1.5. The scheme ensures that information about its existence, procedures and scope is available to customers through scheme members:

(a) when a scheme member responds to a customer's complaint; and

(b) when customers are not satisfied in whole or in part with the outcome of the internal complaints mechanism of a scheme member, when the scheme member refuses to deal with a complaint, or when the time period within which the internal complaints mechanism is expected to produce an outcome has expired, whichever first occurs.

These requirements mean that Victorian public transport users are advised of our services in a number of ways, including:

- through public transport operator websites
- when public transport operators respond to complaints
- through an automated message on public transport feedback lines.

This is in addition to the actions we take to promote our services – including through the use of newsletters, outreach visits and liaison with key representatives of public transport users.

ANZOA has also taken steps to promote the services of Ombudsman offices. For example, ANZOA members participate in university “O-week” activities, providing information about services to new students.

These efforts are, in my view, crucial to informing the community about their right to access independent external dispute resolution services. This is especially the case when, for many of the disputes we deal with, affected persons would not contemplate court proceedings. For example, a person seeking a ticket refund – which will generally have a low monetary value – is highly unlikely to commence legal proceedings if their request is refused.

We also promote our services to operators, through initiatives including regular meetings with operator staff, addressing staff meetings, visiting facilities and providing training services for those dealing with customer feedback.

The Issues Paper suggests (at page 9) a number of possible strategies and matters that need to be taken into account. In my view promotional efforts – at least in our jurisdiction – work best if they target the audience most likely to use our services, at

the time they want to use those services. A generic high-profile campaign may not achieve this outcome.

I agree that having a central access point for referral is of benefit. In certain respects, at least for complaints about services, state government fair trading offices and the Australian Competition and Consumer Commission (through, for example, the Consumer and Business Directory) already provide some aspects of this function. This is in addition to a high awareness of those working in Ombudsman offices or similar schemes about other agencies, so that persons can be appropriately referred.

Chapter 4: Provision of ADR services:

I respond to these questions principally from the perspective of being an industry ombudsman scheme.

Question 4.16: What are the advantages and disadvantages of private ADR services and those provided by industry groups?

Some of the advantages of an industry ombudsman scheme include:

- persons who would otherwise have no way to resolve complaints have a cost-free and informal option to seek redress
- operators can refer persons who may otherwise seek court redress to an informal and well understood process
- ombudsman offices have an expertise in handling complaints, and can provide advice to operators on complaint processes and management
- ombudsman staff develop an expertise in the subject area, increasing the prospect of a timely and expert resolution process
- processes can be tailored to deal with typical disputes
- in addition to resolution of one-off complaints, systemic improvements to an operator's or industry's practice can be recommended and achieved.

Potential issues arising from industry ombudsman schemes include:

- perceptions that because the schemes are funded by industry, they are not independent. Critical here are structural arrangements that ensure the independence of the ombudsman's staff in dealing with individual complaints, while providing accountability for administrative and governance measures.
- a lack of accountability for decisions and processes. In part, this has been addressed by industry schemes through mechanisms including:
 - regular independent scheme reviews
 - the development of a professional association (ANZOA) which assesses the compliance of the scheme and ombudsman with prescribed standards as a condition of membership.

Question 4.23: To what extent is there a need to improve the quality of private, community based or government ADR services? How can quality be enhanced?

It is obviously critical to the effectiveness of ADR processes that persons be properly trained, and that ADR processes be of a high quality. The Public Transport Ombudsman has a range of measures to make sure the services we provide are of a high quality. These include:

- our conciliator job descriptions focus on demonstrated skills in dispute resolution, and we recruit conciliators with experience and/or qualifications in this area

- new conciliators undergo a lengthy induction process with close supervision by our conciliation manager
- we provide a range of professional development opportunities to conciliators specifically relevant to our role, including complaint handling, communications and mediation training
- we undertake regular performance reviews of our officers
- we publish our guidelines for dealing with complaints, including our dispute resolution process, on the Public Transport Ombudsman website
- we have a Privacy Statement which outlines how we deal with information, and we have developed confidentiality agreements for formal conciliations.

Driving our service standards and improvements are:

- a clear framework provided by the National Benchmarks for industry-based external dispute resolution services
- a strong governance framework – including a overseeing Board charged with ensuring the Ombudsman's independence while provided strong governance oversight and industry expertise, and a requirement that the scheme be reviewed to consider its effectiveness
- a strong sense of collegiality within our office, and with other ombudsman schemes – promoted through ANZOA – which enables information and idea sharing.

These types of arrangements – clear benchmarks, good internal governance and strong professional associations – provide a framework for ongoing improvements to the quality of our services.

Chapter 9 – Data, evaluation and research:

9.1 To what extent is there a need to improve the quality of available national data on ADR? What steps should be taken to identify the data required and improve data collection and research?

9.2 To what extent is there a need to improve the quality of evaluations of ADR services? How can ADR services be evaluated, by whom and against what criteria?

As is evident from the matters outlined above, I am of the view that ongoing evaluation of services being provided is a key element in improving those services.

A challenge will be to identify appropriate and useful criteria, especially given the range of disputes that may be amenable to ADR, the range of organisations providing ADR services, and the many types of ADR approaches that can be used. If the criteria are too generic the data and evaluation may not prove to be especially useful. If they are too specific, there might not be a balanced or fair evaluation of the all ADR services.

An approach that carves up the ADR field into sectors, and identifies criteria for each of these sectors, may be preferable. For example, separate criteria and processes may be used to evaluate:

- court provided ADR services
- other government provided ADR services
- industry ADR services
- private practitioners (including private companies) providing ADR services.

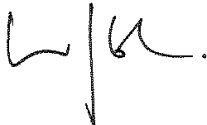
The experience of industry ombudsman schemes provides an example. Criteria for the evaluation of these schemes have been largely settled and are in the National Benchmarks. Evaluations are generally required, through mechanisms such as requirements in the scheme's terms of reference, or broader regulatory arrangements. Those undertaking the reviews generally operate with independence from management, and often have direct experience in the schemes or their evaluation. The reviews are generally publicly available and include the scheme's response to the review recommendations.

Conclusion

I have included with this letter a copy of the PTO's most recent annual report, and some other information about my office. Full information on the PTO is available at our website: www.ptovic.com.au.

Thank you for the opportunity to make a submission to the Enquiry. If you require anything further from my office, please contact me on 8623 2111.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S. Cohen'.

Simon Cohen
Public Transport Ombudsman