

SUBMISSION

**Access to Justice Review
Department of Justice and Regulation
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Introduction

Thank you for the opportunity to make a submission to the Access to Justice Review by the Department of Justice and Regulation (the Department). The submission from my office will focus on questions one and three of Terms of Reference 3:

- does an opportunity exist for an expansion in the use of Alternative Dispute Resolution (ADR) in Victoria, with provision of a specific example; and
- how can knowledge and awareness of the availability and benefit of ADR be improved?

This submission focuses on access to justice for industry-based consumer disputes.

Key benefits of Industry Ombudsmen

Industry Ombudsman Schemes utilise ADR methodologies such as conciliation and shuttle negotiation to support the active involvement of the consumer in the resolution of their complaint and avoid an adversarial environment. This is particularly important when there is an ongoing relationship between the consumer and the service provider that must be rebuilt and maintained.

The Productivity Commission's 2014 report *Access to Justice Arrangements* found that Ombudsman Schemes promote access to justice by:

1. Providing a mechanism for resolving low value complaints;
2. Helping to overcome power imbalances;
3. Providing a process that is simple to use;
4. Identifying and addressing systemic issues; and
5. Resolving both legal and non-legal issues.

The role of the Public Transport Ombudsman Limited (PTO)

The PTO is an independent industry Ombudsman scheme, established in 2004 to receive, investigate and resolve complaints about public transport services provided by members of the PTO scheme.

PTO Scheme members include passenger train, tram and bus companies, and other operators involved in providing public transport services including Public Transport Victoria (PTV) and Southern Cross Station. The Scheme is funded by the industry, based on an annual fixed membership fee and on a variable user-pays basis, calculated on annual complaint numbers.

We have extensive experience in handling customer complaints and working with the public transport industry to improve customer service practices and internal dispute resolution (IDR) processes. We also work with our members to improve how public transport services meet the needs of the Victorian community.

National Benchmarks for Industry-based Customer Dispute Resolution

The PTO complies with the *National Benchmarks for Industry-based Customer Dispute Resolution* (Benchmarks) which were reviewed and relaunched by the Federal Government in 2015. The Benchmarks are referenced in legislation and regulation in some sectors and promote best practice in industry-based dispute resolution schemes.

The Benchmarks are:

Accessibility | Independence | Fairness | Accountability | Efficiency | Effectiveness

Our commitment to the Benchmarks is reflected in all levels of the PTO's activities, from strategic planning and policy development to complaint handling and engaging with consumers.

The Ombudsman is also a member of the Australian and New Zealand Ombudsman Association (ANZOA), which is the peak body for Ombudsman in Australia and New Zealand. All offices of ANZOA members observe the Benchmarks.

Complaint reduction strategies

The identification and resolution of systemic issues reduce the potential for future complaints and contribute to the improvement of services to the public.

The PTO plays an important role in the identification, investigation, resolution and referral of systemic issues that arise in the public transport industry. We define a systemic issue as an issue identified through consideration of a single or series of individual complaints, where the effect of the issue may extend beyond the parties involved.

We are also required under our Charter to identify general trends and systemic issues arising from complaints and raising these issues with members and regulators as the Ombudsman considers appropriate. We have procedures in place to identify continuous improvement opportunities raised through complaints, and work with operators to ensure they are identified and addressed. This leads to improved policies and practices and a better public transport system.

Where appropriate we engage with stakeholders and obtain their feedback on systems improvement. For example, we recently hosted a Roundtable event on young people and public transport after identifying some issues and trends involving youth and public transport. The Roundtable was attended by industry and youth advocacy representatives, and resulted in a number of recommendations around improving the public transport experience for young people.

1. Expanding the use of ADR in Victoria

In broad terms, opportunities exist to expand the use of informal processes for dispute resolution, particularly where the process of attending a tribunal or court is inherently dissuasive for the consumer. This can be because the monetary value at risk doesn't warrant the consumer investing in legal representation, or the consumer may not be able to afford legal representation. In these formal settings a consumer would generally be disadvantaged without correct legal advice, so the result is often that consumers don't pursue a failed appeal or complaint.

The Productivity Commission's 2014 report on Access to Justice Arrangements identifies some of the beliefs that deter consumers from pursuing legal action:

"Some individuals are deterred from pursuing action for fear that the process will prove too slow and costly. One third of individuals who chose not to act on a substantial legal problem

cited a belief that it would be too costly as a reason for inaction. A similar proportion thought it would take too long”¹.

It is my view that the current public transport fare enforcement regime in Victoria falls into the category of dissuading consumers from pursuing action.

Background

The current fare enforcement regime in Victoria is a dual system – consumers who are discovered travelling without a valid ticket can choose to either accept a penalty fare or be recommended for a fine. Those who choose the penalty fare are able to complain to PTV and then to the PTO if they believe they have grounds to dispute the penalty fare.

Consumers who opt for a fine have the opportunity to appeal their fine through an internal review by the Department of Economic Development, Jobs, Transport and Resources. If the internal review is not successful, the consumer’s only recourse is for the matter to go to the Magistrate’s Court. Having to attend court to pursue a further review is a significant deterrent to consumers and is likely to lead to many consumers giving up. This process reinforces a power based approach to dispute resolution, rather than one which considers the rights and interests of the consumer.

Although the PTO does not investigate complaints about transport fines, there has been a steep increase in complaints to my office from consumers who have received a transport fine. In the 2014/2015 financial year, we had a 90% increase in enquiries and complaints related to fines received on the public transport system. This may be an indication of consumer dissatisfaction with the review options available under that process.

Use of the PTO

By inserting a mandatory process of review by the PTO after an internal appeals process and before the matter proceeds to the Magistrates Court, consumers would have access to a dispute resolution mechanism which doesn’t carry the deterrents associated with a formal court process.

More generally, an Ombudsman Scheme is appropriate for resolution of low monetary value disputes in circumstances where a consumer would otherwise not contemplate court or tribunal proceedings.

As an independent body, the PTO does not take sides or advocate for either party. However we recognise that there is often a power imbalance when an individual has a complaint about a large organisation or public authority. PTO staff are trained to provide support and information to ensure that a level playing field is established between the consumer and the operator, and staff have the expertise to guide vulnerable consumers through our process and suggest external support and assistance when it is appropriate.

2. Improving ADR and knowledge and awareness of the availability and benefits of ADR

The Productivity Commission noted that some of the unmet legal need in the community can be addressed by raising the visibility of existing Ombudsman services.

Effective referral mechanisms are important in ensuring that consumers are made aware of relevant ADR services at the point in time when they need them. When consumers initially interact with the

¹ *Access to Justice Arrangements* Productivity Commission Inquiry Report No 72 5 September 2014, page 11.

judicial process, they should be provided with information about ADR alternatives. Services that refer consumers to the judicial process or provide advice on their rights should also be able to tell consumers if they have recourse through an ADR process.

A broad-based referral resource that is provided to all these services and regularly updated would sit comfortably with a body such as Consumer Affairs Victoria (CAV), which is the logical destination for consumer disputes. Currently the CAV has a 'Resolve a Dispute' page on their website which provides links to a range of ADR schemes. This could, for example, be expanded to become a more detailed and prominent information and referral resource. The referral service should be both telephone based and online and provide specific information on particular ADR bodies, as well as general process information and how ADR differs from formal arbitration. It should also include protocols for referral assistance to ensure that the service is accessible to all consumers.

ADR services undertake outreach and form relationships with bodies such as Community Legal Centres (CLC's) and other relevant advocacy groups, partly for the purpose of expanding referral and information networks. Ideally when those bodies have clients who might benefit from using an ADR mechanism, such as an Industry Ombudsman, their staff have access to information that allows them to make an effective referral.

However the relationships between the various advocacy groups and ADR bodies are variable and no framework or simplified mechanism for referral of consumer complaints between these bodies has been defined. The proposed central referral and information resource would also be particularly useful for consumers who have a number of disputes at the same time.

Industry Ombudsman Schemes, including the PTO, have well developed policies and procedures in place to ensure that the needs of vulnerable consumers are handled appropriately. However development of relevant protocols alongside the proposed referral/information resource will give CLC's and other advocacy bodies confidence that their clients will be supported appropriately. Of course, the CLC or other advocate would always have the option of acting on behalf of their client in instances where they believe the consumer's circumstances warrant it.

Any new referral/information resource will only be useful if people know about it. Awareness-raising of ADR schemes requires a commitment to effectively publicise any new service or resource. This obligation is shared by the participants, as well as the Department and relevant agencies. The Department could follow up with regular consumer surveys to gauge the public's awareness of their ADR options and target promotion activities accordingly.

Further information

If you require any further information, please contact me.



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