



Queen Margaret University
CONSUMER DISPUTE RESOLUTION
CENTRE

**Independent Review of
The Public Transport Ombudsman, Victoria**

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1. FOREWARD

1.1 The scope of the review

Paragraph 23 of the Constitution of the Public Transport Ombudsman Limited requires that:

The Board shall conduct reviews of the Scheme and develop proposals for its continued operation. Such a review shall be undertaken every five years with the first to be conducted by the fifth anniversary of the inception of the Scheme. All reviews shall be conducted in consultation with interested parties, including groups representing users of public passenger transport services, community groups representing public interest issues relevant to public passenger transport services, members, the Secretary and the Minister.

Further detail concerning this requirement is provided in the Charter of the Public Transport Ombudsman Limited which states at Paragraph 10.2(h) 'to consider the appropriateness, scope and effectiveness of the PTO scheme, and, in particular, to review the scheme every five years commencing on the fifth anniversary of the inception of the scheme'.

This report outlines the findings of the five-year independent review of the PTO, conducted by the Consumer Dispute Resolution Centre at Queen Margaret University in Edinburgh, Scotland.

The scope of the review is to:

- 1) provide the Board with assurance and clear and reasonably specific information about the current operation of the PTO against:
 - the Benchmarks for Industry-based Consumer Dispute Resolutions Schemes;
 - Australian and New Zealand Ombudsman Association (ANZOA) membership requirements; and
 - the PTO's own Value Proposition;

- 2) independently consider the governance structures of the PTO, with particular focus on the Ombudsman's independence and the Board's overall effectiveness; and
- 3) gain valuable insight into the Scheme's readiness to face future operational and strategic considerations and expectations of its key stakeholders.

The outputs from this review and the Board's response are to form part of the PTO's broader recommendations to government regarding its Charter, jurisdiction and governance. In commissioning this review, the Board of the PTO have adopted a '*best in breed*' approach.

1.2 The Review Team

The Consumer Dispute Resolution Centre (CDRC) at Queen Margaret University is a centre of excellence in the provision of CPD, research, and consultancy services for complaint handling organisations. This review was undertaken by Dr Gavin McBurnie and Jane Williams. Short biographies of the members of the review team are attached as Appendix One.

1.3 Methodology

The following approach to the review was adopted.

Phase 1: Desk-top research was undertaken by the review team. An initial list of documents necessary for the review was sent to the review team by the PTO for consideration prior to the subsequent field visit in phase 2. In addition, other documents were sourced from relevant websites prior to the field visit. Eighty-seven documents provided by the PTO individual documents were reviewed.

Phase 2: One member of the review team conducted fieldwork in Melbourne. This consisted of discussions held between a member of the review team and representatives from consumer organisations, member organisations and staff and Board Members from the PTO itself. The organisations with whom those interviews

were held are listed in Appendix Two. A total of 14 meetings with external stakeholders (industry and community group representatives) were held either by telephone or face-to-face, along with three interviews with board members, and further interviews and discussions with staff. In addition, a member of the review team observed staff at work.

This member of the review team also undertook a review of 42 cases. These cases included five non-member enquiries, five Refer to Member complaints, ten Refer for Internal Escalation complaints and 22 investigations. The sample included complaints about trams, rail and bus companies, and infrastructure complaints and included a range of issues such as ticketing, staff conduct, delays and the impact of infrastructure development.

The reviewers are confident that all relevant information necessary for this review was collected and considered.

1.4 Acknowledgements

The review team wishes to thank:

- The PTO for making the necessary local arrangements for the field visit;
- The staff of the PTO for their time in answering questions and providing information; and,
- The many individuals from consumer groups, provider organisations and other stakeholders who generously gave up their time to discuss the PTO with the review team.

Their input is greatly appreciated and ensured the review team was able to come to a holistic view on the performance of the PTO.

1.5 Structure of the report

The report comprises three sections. The first section provides the executive summary. The second section provides background and context for the report. It covers the public transport system in Victoria, provides some key background information on the Public Transport Ombudsman, and provides an overview of relevant literature on consumer

dispute resolution and consumer ombudsman. The third section of the report reviews the performance of the PTO against the six Key Benchmarks for Industry-based Consumer Dispute Resolutions Schemes, the Australian and New Zealand Ombudsman Association (ANZOA) membership requirements, and, the PTO's own Value Proposition. Table 1 below maps the differing criteria against one another.

Key Benchmarks for Industry-based Consumer Dispute Resolutions Schemes	ANZOA Criterion ¹	Value Proposition ²
Accessibility	Accessibility	We're here to listen. We're here for the whole community
Independence	Independence	We have the power to act, influence and drive change.
Fairness	Procedural Fairness/Powers	We're impartial and achieve fair resolutions.
Accountability	Accountability	We're here for the whole community
Efficiency	Powers	We help people reach agreements.
Effectiveness	Jurisdiction/Powers	We are highly skilled. We act on opportunities to improve the system.

Table 1: Mapping of Benchmark, ANZOA membership criteria and the PTO Value Proposition.

In this report, the term ombudsman is used as both the singular and plural form of the term ombudsman.

¹ The ANZOA criterion for 'powers' is made up criteria which do not match to a single Benchmark but are spread across the 'fairness', 'efficiency' and effectiveness' criteria.

² The Value Proposition commitments do not map across neatly to the Benchmarks (nor need they) but the review team believe the allocation within the table is broadly commensurate with the intent behind the commitment. Again, note that individual propositions may map to more than one Benchmark.

Part One: EXECUTIVE SUMMARY AND RECOMMENDATIONS

2.1 Overall conclusion

The review team can confirm that the PTO is an effective dispute resolution scheme. To maintain its effectiveness into the future, the review has highlighted a number of areas for further development. The PTO meets the requirements of the *Key Practices for Industry-based Customer Dispute Resolution* ('Key Practices'). The review team did identify a number of areas where, although the PTO met the requirements the 'Key Practices', there was potential scope for improvement. These are highlighted below and in the recommendations section.

In conducting the review, the review team has sought not only to assess whether the PTO is meeting minimum standards, but also to consider future developments that would be of benefit and enable the PTO to achieve its aim of being '*best in breed*'. As a result, although the review team is satisfied that the PTO is an effective and well-run consumer dispute resolution scheme, it makes a number of recommendations in this report which seek to encourage and ensure the continued success of the PTO.

The review team, in synthesising academic research and papers together with the consumer and stakeholder information gained from the PTO surveys, suggests that a 'best in breed' consumer ombudsman will demonstrate the following features:

- Have high levels of general community awareness, particularly within vulnerable groups;
- Will be easily accessible to potential users, utilising a range of mechanism to enable complaints to be made easily and quickly;
- Will provide advice on the overall complaints system and is able to easily refer those who seek advice to more appropriate organisations, members or advocates as necessary;

- The handling of individual complaints will be driven by fairness considerations which is more than procedural fairness but includes interactional and distributive justice;
- Will demonstrate high levels of transparency about its internal and external activities;
- Will act as an effective catalyst for system improvement, to the benefit of service users, the operators and government;
- Will be demonstrably independent (both in perception and in fact) from members and government; and,
- Will be able to consider all, or nearly all, complaints arising in its industry sector.

These characteristics will be used to assist in the development of recommendations in keeping with the PTO's requirement for a 'best in breed' approach. These central findings act as an underlying theme of this report.

2.2 Summary of recommendations

The review team makes the following recommendations to the Board of the PTO.

2.2.1 Accessibility

Raising awareness

It is recommended that the PTO works with operators on the development of a consumer engagement strategy to promote both the overall public transport complaints system and, specifically, the role of the PTO at transport facilities.

It is recommended that the PTO develops a fully resourced overarching awareness promoting strategy.

Vulnerability

It is recommended that the PTO should particularly focus its awareness raising activities on under-represented socio-demographic groups.

It is recommended that the PTO reviews its provision of material for those with additional needs.

2.2.2 Independence

Structure of the Board

It is recommended that the Board of PTO consider reducing its Board size to five members.

It is recommended that as, well as reducing the Board from seven members to five members, the Board should be established on the basis of an independent chairperson, one industry director, one consumer director, drawn from consumer interest groups active in the area of public transport, and two independent directors.

It is recommended that the Board assumes responsibility to appoint directors. In implementing this change, the Board of the PTO should review the activities of consumer ombudsman that have such a role and agree a revised process based upon this experience.

The Chairperson of the PTO should also be appointed by the Board following a recommendation from the nominations committee, but in this case the nomination should also be passed to the Department of Transport for consideration but not approval.

It is recommended that the Constitution of the PTO be amended to include the length of appointment for both directors and the chairperson.

The position of the Ombudsman

It is recommended that the Board consider appointing the Ombudsman as an additional sixth board member.

The role of the Board

It is recommended that the Board reviews its role in the development of organisational strategies and policies and work with the senior staff members to create a culture which encourages senior staff to implement these strategies and policies as freely as possible while being held to account.

It is recommended that the PTO establish an Advisory Committee, consisting of relevant industry and consumer interests to support the work of the Board.

Funding of the PTO

It is recommended that the requirement for members of the PTO to approve the annual budget figure at a general meeting is removed, with this responsibility being delegated to the Board.

Other governance issues

It is recommended that references to the PTV or any subsequent replacement entity are removed from the Charter of the PTO.

It is recommended that the PTO discuss with the relevant Department and/or Minister the establishment of the PTO on a statutory footing.

2.2.3 Fairness

Procedural fairness

It is recommended that where versions of events differ on significant points, in seeking further evidence by which to take a view, caseworkers conduct interviews of all relevant witnesses or participants, enabling the caseworker to establish a view on the weight that should be given to the competing versions, thus helping make a robust decision.

The fair and reasonable test

It is recommended that the PTO keep under review its approach to the fair and reasonable test and its use by casework staff.

2.2.4 Accountability

It is recommended that the PTO publishes more of its complaints data, decisions, particularly the result of systemic investigations along with information about its other activities.

2.2.5 Efficiency

The public transport complaints system in Victoria

It is recommended that the potential for complainant confusion, dissatisfaction and complaint fatigue be reduced by removing the role of the PTV from the complaints process other than for those issues for which they have sole responsibility.

It is recommended that the PTO should liaise with the PTV about the provision of data which the PTV would find of assistance in its role as provider, co-ordinator and promoter of the public transport system in Victoria.

Review of investigations

It is recommended that the PTO review its complaint handling process to clarify the process for when a case should move from attempted conciliation to case assessment and ultimately adjudication.

It is recommended that the PTO reviews its criteria by which it decides whether or not to treat a complaint as a Refer For Internal Escalation (RFIE) or as an investigation. Should a complaint be treated as an RFIE, there should be more active follow up by the PTO with the complainant of action taken by the operator.

The PTO as design authority

It is recommended that, based upon its expertise and knowledge, the PTO should lead the system in designing a good complaint system.

Assessing performance

It is recommended that the Board of the PTO review its set of performance indicators with a view to developing a more holistic view of office performance.

It is recommended that the PTO provides detail of its performance against its KPIs in its Annual Report.

2.2.6 Effectiveness

The Public Transport Ombudsman

It is recommended that the mission and aims of the PTO and contained within the PTO Charter should explicitly incorporate each of the five functions of a modern CDR scheme, namely, consumer advice, individual dispute resolution, data analysis, data publication and improving market behaviour, as part of its formal role.

It is recommended by the review team that the data analysis conducted by the PTO on complaints is not only produced and provided to members but is also published on its website.

Jurisdiction

It is recommended that the role of the PTV, described in paragraphs 1.8, 5.1(a) and (b), and 7.1(d) are removed.

It is recommended that the PTO discuss with the DoT the inclusion under its jurisdiction both VicRoads and all infrastructure projects being developed under the auspices of Victoria's Big Build.

Authorised officers

It is recommended that the PTO discuss with the DoT the issue of it having the ability to take on complaints about travel infringement notices in certain circumstances.

It is recommended that the PTO should be able to exercise discretion in multi-faceted complaints, including some complaints about TINS, where there are special or exceptional circumstances.

Other jurisdictional issues

It is recommended that the PTO discuss with the Department of Education whether there is a second-tier complaints service for those using free school bus services, and, if there is not, it is further recommended that the PTO should become the second-stage complaints operator for those services.

It is recommended that the PTO is established as the single public transport complaints body which enables easy access by complainants to a single body able to deal with almost all their complaints.

Binding limits

It is recommended that the PTO reviews its binding limits.

Systemic investigations

It is recommended that the PTO revises its approaches to systemic investigations to adopt a broader range of approaches, ideally all four detailed above, and work with operators on the development of this policy.

PART TWO: BACKGROUND AND CONTEXT

3.1 Public transport in Victoria

People expect, and normally take for granted, an efficient, reliable public transport system. In Victoria, approximately 600 million passenger journeys are made annually, with journeys in the metropolitan area of Melbourne accounting for approximately 500 million of these passenger journeys. In common with public transport systems in other major conurbations, the public transport system is commonly affected by congestion, with many services running at peak capacity. The consequence of this is that any single problem may result in exponential negative consequences upon the whole transport system.

Reality demonstrates repeatedly that, in such a busy, complicated system, errors and failings occur, from either internal or external causes. Indeed, EY Sweeney (2018, p.9) reported that according to its research 88% of transport users had ‘experienced a public transport issue’. As one would expect, in a mature democracy, individuals affected by problems with public transport can raise a complaint with the operator responsible for the service. Commendably, and world-leading at that time, in 2004, the Victorian government established the PTO to act as a second-tier industry-based consumer dispute resolution body, to consider disputes that remain unresolved between complainant and operator. Since that date, the PTO has become an important, accepted and respected part of the public transport ecosystem.

The Victorian Government, recognising this reality, has commenced major development of the Victorian Public Transport System, collectively known as Victoria’s Big Build, and which comprises 41 major transport projects at a cost of around \$57 billion (Victoria’s Big Build 2019). These investments are in both rail and road projects and the projects are overseen by the Major Transport Infrastructure Authority. This is indicative of the forward-thinking of the Victorian Government’s recognition of the intrinsic inter-relationship between road and rail infrastructure. The Victorian premier Daniel Andrews

is reported as saying ‘... the agencies needed to keep up with the changing nature of the state’s transport networks, which are increasingly planned as one’ and that this new agency would better integrate road and rail planning and operations as part of an integrated transport network (Cary 2019). This is further evidenced by the fact that many journeys made by Victorians are multi-modal in nature and efficient travel relies on all elements of the travel infrastructure operating effectively.

3.2 The Public Transport Ombudsman Victoria

The Public Transport Ombudsman (PTO) was established in 2004 as the second-tier dispute resolver for complaints about some elements of public transport in Victoria. Unlike some other consumer ombudsman schemes the PTO is not founded upon a statutory footing. Although seen as a consumer ombudsman, the PTO could more appropriately be considered as a hybrid ombudsman – that is, an ombudsman which has jurisdiction over bodies ostensibly in the private sector but which provide public services or receive public funding and thus have significant public accountability. This has implications for the review as it means that it is important to consider both the public and private sector consumer ombudsman models when reviewing the PTO.

Key Facts

It currently has eleven members:

- Bus Association Victoria
- Level Crossings Removal project
- Metro Trains
- Public Transport Victoria (PTV)
- Rail projects Victoria
- Southern Cross Station
- SkyBus
- TransDev
- V/Line
- VicTrack
- Yarra Trams

The Bus Association Victoria is a member in its role as the professional association for Victoria's accredited bus and coach operators.

The PTV is responsible for providing, coordinating and promoting public transport. It is the franchisor for the rail and tram system. In practice, it acts as quasi-regulator of some parts of the Victoria public transport system (rail, trams and buses). Public Transport Victoria will cease to exist at some point in 2019 and will become part of Transport for Victoria (T for V). At this point T for V will likely become a member of the PTO. For the purposes of this report the use of the term PTV includes both the current PTV and its replacement body as appropriate

The PTO has a Board is established of seven persons, comprising the chairperson, three community representatives and three industry-appointed representatives. The Ombudsman has a total of 10.5 fte staff complement to support her work, broken down as follows:

- Operations Manager and Dispute Resolution: 6.4 fte
- Policy and Communications: 2.4 fte
- Business Manager and Administration Coordinator: 1.7 fte

In 2017/18 it undertook the following activity, described in Table 2:

File Type	Count
Investigation	595
Refer For Internal Escalation	504
Complaint	1194
Enquiry	315
Out of jurisdiction	448
Total	3056

Table 2: Approaches to the PTO by type in 2017/18

3.2.1 Surveys concerning the PTO

In 2017 the PTO conducted a stakeholder survey while in 2018 EY Sweeney was commissioned by Public Transport Victoria to conduct research aimed at gaining a ‘a

better understanding of how the PTO's target audience ... perceive the organisation' (EY Sweeny 2018, p.5).

3.2.1.1 Key results from the PTO's stakeholder survey

Key findings from the stakeholder survey include:

1. A lack of awareness of the PTO;
2. Less than 60% of respondents believed that the PTO is able to handle or resolve most transport related issues;
3. Less than 50% of respondents believed that the PTO could handle or resolve the majority of issues about which people wished to complain;
4. Less than 50% of respondents felt that the scope of the PTO was wide enough to enable people to have confidence in it;
5. Concerns about PTO's jurisdictional limitations;
6. Concerns around the ability of the PTO to consider the impact of environmental issues arising from the work of members; and,
7. A common theme in feedback comments was the need for the PTO to raise its awareness and for it to increase its communication, and its level of collaboration, with its stakeholders.

3.2.1.2 Key results from EY Sweeney research

Meanwhile key findings from EY Sweeney research (which surveyed members of its PTV Community and, therefore arguably, more informed about public transport issues than the average Victorian) were:

1. 88% of participants had experienced a transport issue but only 22% have contacted any organisation about the issue, with PTV the most contacted organisation;
2. The PTO is 'top-of-mind- for only 5% of participants with issues while only 42% of them had even heard of the PTO. Only 36% of all respondents were aware of the PTO;
3. Participants were unaware of the PTO's role in system improvement;

4. There was uncertainty about the PTO's scope (what issues can they help with), capability (is it able to deliver what it wants to deliver) and its independence;
5. While the majority of issues experienced by participants related to service provision, 15% of issues related to Authorised Officers and Infringement Notices;
6. Reasons for not pursuing a complaint included lack of knowledge about the complaint system, a perceived feeling of likely high cost/low benefit, and a lack of trust in the system;
7. Two in three people were unaware of the PTO's system improvement activity which fed a mindset that some issues are too minor to report – if informed of the PTO's system improvement role the number of people willing to report issues to the PTO rises dramatically;
8. Participants were unaware of the jurisdiction of the PTO;
9. Participants were unclear about the independence of the PTO from members and government; and.
10. The PTO's Value proposition could play an important role in informing the public of its role and ability to achieve results and, therefore, could be used as a core element of any awareness activity.

Taken together, the following themes arising from this research become apparent:

- Low awareness of the PTO;
- Lack of understanding of the scope of the jurisdiction and, where people do have an understanding of its scope, a belief that it is too narrow;
- Concerns about the independence of the PTO from members and government; and,
- Lack of awareness of the PTO's ability to secure individual benefit and system change.

3.3 Consumer Dispute Resolution

With the privatisation of former public services, and the delivery of some public services as if they were private businesses, it is essential for consumers to have trust both in their provision and that the markets are working fairly (Hodges 2018). It is important, therefore, should disputes arise between consumers and businesses, that there are mechanisms by which these disputes can be resolved particularly where those complaints relate to hybrid goods. Courts are not a realistic option for such complaints, due to the normally low monetary values of the claims involved and the power asymmetry between the parties, and this means that the alternative approach of consumer dispute resolution (CDR) schemes are now seen as the best available technique (Gill et al., 2016; Hodges 2018). Underpinning this shift is the development of the idea of consumerism which includes the principle that people with a complaint should have it resolved simply, quickly and cheaply (Hodges 2018, p.55, O'Brien 2015). Consumer ombudsman are seen as one type of consumer dispute resolution schemes.

For Hodges (2018), one of the explanations as to why consumer dispute resolution is rapidly developing around the world is because it is able, if used fully, to deliver more than just individual dispute resolution. While consumer ombudsman are seen as just one type of consumer dispute resolution schemes they are normally seen as providing something over and above that provided by other forms of CDR. Their advantages over other forms of dispute resolutions schemes include their ability to provide consumer advice and information including additional assistance for vulnerable consumers, adopt an inquisitorial approach and to raise standards by feeding back lessons (Gill and Hirst 2016)

Hodges (2018) suggests that there are five potential functions that can be delivered by a 'best in breed' consumer ombudsman:

1. Consumer advice
2. Individual dispute resolution

3. Data analysis: analysing data on complaints received to identify issues and trends
4. Data publication: provides feedback to consumers, the industry, regulators and other stakeholders
5. Improving market behaviour: This can be achieved through the publication of information or systemic activities.

Increasingly, therefore, ombudsman view themselves as experts in the complaints system and commentators argue that they should use this experience and their role within the overall system to improve the overall complaints processes at all levels. This is particularly true for consumer ombudsman operating in regulated sectors. For example, in a review by Lucerna (2015) of a UK consumer ombudsman, Ombudsman Services: Energy Lucerna noted that Ombudsman Services: Energy had three roles: individual complaint handling, improving complaint handling by energy firms, and, identifying systemic industry wide issues. Lucerna (2015, p.43) encouraged Ombudsman Services: Energy to undertake greater activity in the latter two of these three roles stating that doing this “has the potential to drive significant benefits for all consumers – those who complain, those who complain initially but do not pursue their claim to the ombudsman, and those who never complain”.

In conducting this review, the review team will consider these five roles that consumer dispute resolutions schemes are providing with the intention of making recommendations that seek to deliver ‘best in breed’ positioning for the PTO

3.3.1 Setting the PTO’s roles and boundaries

It was noted that addressing systemic issues can be particularly challenging for consumer ombudsman schemes (Gill et al 2013). In addition, Gilad (2008) suggests that ombudsman schemes can also face challenges in interpreting and articulating their role and boundaries, to both internal and external audiences, a phenomenon she describes

as ‘domain perception’.³ This builds upon previously existing regulatory capture theory which suggests that regulators trade lenient regulation for material support and resources (Stigler 1971, Peltzman 1976). Contrasting this, there is the argument that regulators need to be sensitive to the views of ‘citizen-consumers’, as, if they lose their trust and confidence, the regulator risks adverse media and political scrutiny, with subsequent risk to its survival and autonomy (Gilad 2008). Thus, regulators need to strike a balance between the desire for industry support and resources and the need to maintain public support, described by Gilad (2008, p.908) as a ‘legitimate compromise’.

In addition to the need for industry and public support, public regulatory organisations also have a third boundary – that is, potentially competing agencies and institutions (Gilad 2008). Wilson (1989) suggested that, rather than seek maximal territory, public organisations tend to seek coherent, discrete territories over which they have primacy. The final aspect that affects an organisation’s domain perception is that, in seeking legitimacy, the organisation will be influenced by the ‘normative expectations’ within the professional networks in which they operate (Gilad 2008). This creates a second tension for these organisations – to balance the ‘demands of their local environments [industry and consumer demands, and potentially competing agencies] and the expectations of their professional communities’ (Gilad 2008, p.909).

3.3.2 Summary

Synthesising this academic background and the consumer and stakeholder information gained from the PTO surveys, it is suggested that a ‘best in breed’ consumer ombudsman will demonstrate the following features:

- Have high levels of general community awareness, particularly within vulnerable groups;
- Will be easily accessible to potential users, utilising a range of mechanism to enable complaints to be made easily and quickly;

³ While the rest of this section discusses Gilad’s work in relation to regulatory organisations, Gilad’s subsequent research showed that the concept of domain perception applies equally to consumer ombudsman.

- Will provide advice on the overall complaints system and is able to easily refer those who seek advice to more appropriate organisations, members or advocates as necessary;
- The handling of individual complaints will be driven by fairness considerations which is more than procedural fairness but includes interactional and distributive justice;
- Will demonstrate high levels of transparency about its internal and external activities;
- Will act as an effective catalyst for system improvement, to the benefit of service users, the operators and government;
- Will be demonstrably independent (both in perception and in fact) from members and government; and,
- Will be able to consider all, or nearly all, complaints arising in its industry sector.

These characteristics will be used to assist in the development of recommendations in keeping with the PTO's requirement for a 'best in breed' approach. These central findings act as an underlying theme of this report.

PART THREE: BENCHMARKING THE SCHEME

This section of the report assesses the PTO against the six Benchmarks for Industry-based Customer Dispute Resolution (Australian Government 2015)

Benchmark One: Accessibility

Principle: The office makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers.

Purpose: To promote access to the office on an equitable basis.

4.1 Awareness

The PTO conducts a limited range of activities by which to increase its awareness. There is its Facebook presence but no other social media activity. It does issue media releases but these are very limited in number, and principally, are issued to support the publication of the PTO's Annual Report. From 2012 until 2017 the PTO produced a total of ten issues of an e-Bulletin but none has been issued since late 2017. It conducts a range of outreach activities as part of its communities' strategy and is seeking to visit at least 29 community organisations in 2019. Nonetheless, the review team noted that the team responsible for awareness raising activities was limited in size which constrained the ability of the organisation to promote its awareness.

The PTV conducts an annual survey of the awareness of the PTO. Figure1 shows the % level of awareness of the PTO scheme for the last nine years, from 2009 to 2017. It is noticeable that there is a marginal increase in awareness over the last nine years. These figures compare badly with the finding in the EY Sweeney report that states that 83% of respondents agreed that people who use public transport should know of the PTO. There is a large and significant gap in awareness. Ombudsman Schemes generally suffer from low awareness (Productivity Commission 2014)

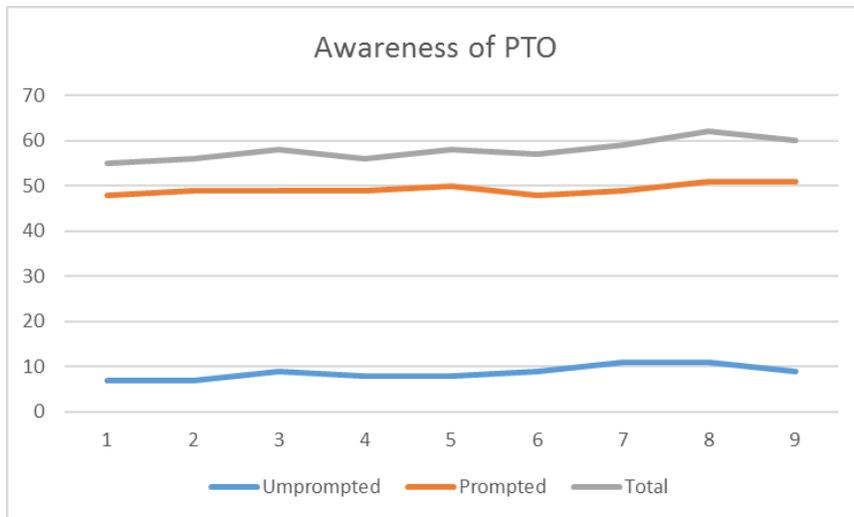


Figure 1: Level of awareness in the PTO.

During the interviews there was a general consensus that there was a lack of awareness of the PTO and a lack of understanding about its role and services. This was the overall belief of the consumer interviewees while the industry interviewees were more split on this view.

It became evident through the review team's interviews with industry members that a tension exists for industry members between raising awareness and the potential costs of so doing. One industry participant described it as a 'balance between funding and awareness' while another industry participant explained that, while happy at present, if increased awareness led to increased complaints and thence costs, the funders of the scheme may take a different view of the office. Thus, industry members want acceptable levels of awareness but not too much in case that increases the activity of the ombudsman. This would create two additional costs for the operator. Firstly, increased activity by the PTO would increase membership levies and, secondly, through increased transaction costs incurred by the operators as a result of the PTO potentially investigating more complaints. As a result of this tension between raising awareness of the PTO and the potential increase in costs, there was some support for the PTO conducting awareness activities, as long as it was limited.

It is in this context that a concern, raised by industry participants, about the PTO's use of its Facebook presence, which one industry participant described as the PTO 'overstepping the mark' to promote awareness of its existence should be seen. This is, principally in reference to the banner on the PTO's Facebook page which states '*Do you have a complaint about public transport? We can help you*'. The review team were told that this concern was primarily about the PTO potentially usurping the role of the operator to have first attempt at complaint resolution.

It is our view that this concern is misplaced. First, the PTO cannot accept complaints that have not firstly been considered by the operator except in rare circumstances where the ombudsman may use their discretion to accept the complaint. Second, the PTO should have an advisory role for people who wish to make a complaint about public transport as it is the pinnacle of the public transport complaints system. It appears that the PTO may already provide a significant role in advising complainants back to the operator as it provides advice to circa 2,000 persons per annum.

The EW Sweeney (2018, p.17) report states that two of the three main reasons for failing to complain about service issues are lack of knowledge on how to complain and a lack of trust in the system. This is exacerbated by the low awareness of the PTO (EY Sweeney 2018, p.35). In some jurisdictions signposting to ADR is seen as essential for raising awareness because levels of awareness remain low and without effective signposting consumers are unlikely to access ADR (Slater and Higginson 2016). The EU's Directive on Consumer Alternative Dispute Resolution 2013/11/EU, for example, requires business to signpost relevant ADR schemes at the conclusion of a complaint whether or not they are members of a scheme. Regulators in the UK often see signposting as important for transparency, and detailed requirements are found in many of the schemes. EY Sweeney (2018, p.26) reported that just over one in three people surveyed agreed that the PTO should provide impartial advice.

The PTO has produced a Member Awareness Policy that outlines the responsibility of members to promote awareness of the PTO. This identifies three approaches to raising

awareness of the PTO by members: information about the PTO on members' websites; the promotion of the PTO when a person has raised a complaint to it; and, the provision of information about the PTO at public transport facilities. These activities by members are important in raising awareness of the PTO. However, the review team was informed that operators were reluctant to provide information at public transport facilities (see also EY Sweeney 20018, pp.9, 19, 34). Indeed, EY Sweeney (2018, p. 34) claimed that users questioned the independence of the PTO as there had been so little activity to promote its activities, resulting in some people thinking it is 'hiding'.

In the view of the review team, there is no significant negative impact arising from increasing awareness of the PTO. Such a view suggests an attitude that complaints and, by extension, the PTO are costs centres, rather than a mechanism by which operators can improve services, improve public confidence in public transport and reduce costs. One recent attempt from Australia sought to assist organisations in demonstrating that complaints departments are not just 'cost centres' (SOCAP 2018). Maintaining public confidence in the public transport system requires mechanisms to be in place where dissatisfied customers can raise their dissatisfaction and have these considered appropriately. This is particularly true where there is little market competition and thus consumers have reduced voice.

Raising awareness of the complaints system, including the role of the PTO, serves the interests of the public transport system. An example of this is the work that was undertaken by the PTO which highlighted problems relating to Authorised Officers (AOs) and Travel Infringement Notices – since the government adopted the PTO's recommendations in these areas, the operators have conducted further training for their AOs and which has resulted in a significant reduction in the number of complaints in these two areas.

It is recommended that the PTO works with operators on the development of a consumer engagement strategy to promote both the overall public transport complaints system and, specifically, the role of the PTO at transport facilities.

It is recommended that the PTO develops a fully resourced overarching awareness promoting strategy.

4.2 Vulnerability

If an ombudsman scheme is to be effective to all potential users, irrespective of background or needs, users must be aware of the scheme's existence and feel comfortable in using it, and this requires extra understanding by those working in the ombudsman scheme towards those from a minority background or who are otherwise particularly vulnerable (Beqiraj 2018, p.16, Brennan et al. 2017a). Ombudsman schemes need to be aware of any particular additional needs of whatever type, exhibited by service users, at every stage of the complaints process (Beqiraj 2018, p.16).

The review team was informed that, although the PTO does not collect socio-demographic data but the perception of the office is that the typical service user was older, employed and at least second-generation Australian (excluding indigenous Australians). This profile is broadly in keeping with other ombudsman schemes, both consumer and public ombudsman schemes, and, indeed, reflects broader use of services relating to the administration of justice internationally (BEIS 2018, Creutzfeldt 2014, Hubeau 2018).

The PTO is aware of its responsibilities to vulnerable and minority ethnic communities. In doing this it produces leaflets in eleven non-English languages which provide basic information on using the service of the PTO and cover the principal minority groups in Victoria. This is supported by promoting the Australian Government's Translating and Interpreting Service which will support people, for whom English is not their first language, to use the service. The home page of the PTO website allows for users to change the font size to one that they prefer which will aid those with some forms of visual impairment. It has also posted a web page explain how the PTO can help an individual which is both subtitled and provided in Auslan. People with a hearing impairment are also able to use the National Relay Service.

The UK's Financial Ombudsman Service (FOS) is a leader in this area. It provides:

- Leaflets in 13 languages other than English
- Document Translation
- Telephone interpretation services
- BSL trained staff
- Easy read text
- Text relay calls
- Braille, large-print and audiotape information.(FOS nd)

For a small organisation the PTO makes significant effort to be as accessible as possible to as wide a range of potential customers as possible. Some organisations, such as the Parliamentary and Health Service Ombudsman in England use BrowseAlound software which will translate web pages into foreign languages. EWON has a button on its front web page which translates the website into that language.

It is recommended that the PTO should particularly focus its awareness raising activities on under-represented socio-demographic groups.

It is recommended that the PTO reviews its provision of material for those with additional needs.

Benchmark Two: Independence

Principle: The decision-making process and administration of the office are independent from participating organisations.

Purpose: To ensure that the processes and decisions of the office are objective and unbiased, and are seen to be objective and unbiased.

5.1 Structure of the Board

The review team has examined the structure of boards of other consumer ombudsman schemes and this is summarised in Table 2. The PTO is the smallest consumer ombudsman by turnover and staff size in Australia and New Zealand. As Table 2 demonstrates, the current construct of the PTO Board is not anomalous with its peers in Australia and is compliant with the Key Practices for Industry-based Customer Dispute Resolution document (Australian Government 2015, p.12 fn 18). However, there are three trends that are becoming apparent as consumer ombudsman modernise:

1. Boards are reducing the number of consumer and industry directors, replacing at least some board members with independent directors, in keeping with the recommended approach of the AICD;
2. Boards are increasingly assuming responsibility for the appointment of board members;
3. There are clear limits on the length of appointment and which is the same for all class of directors (excluding the chairperson)

The constitution of the PTO allows for a Board of up to eleven members (Paragraph 14.1) although it has comprised of seven members to date. The Board consists of an independent chairperson, three industry directors and three consumer directors.

Organisation ⁴	PTO	EWOSA	UDL	EWON	EWOV	TIO	AFCA
Turnover ⁵	\$2,000,000	A\$3,400,000	NZ\$3,900,000	\$11,500,000	\$12,000,000	\$29,000,000	
Number of directors	7	9	5	11	9	9	Up to 11
Make up of directors ⁶	Chairperson 3 IDs 3 CDs	Chairperson 4 IDs 4 CDs	Chairperson 1 ID 1 CD 2 Ind Ds Moving to 4 Ind Ds	Chairperson 5 IDs 5 CDs	Chairperson 4 IDs 4 CDs	Chairperson 3 CDs 3 IDs 2 Ind Ds	Chairperson 5 IDs 5 CDs
Appointment basis	Chair and CDs appointed by responsible Minister; IDs rotation among members.	Chair – appointed by Board IDs elected by members CDs proposed by Essential Services Commission and confirmed by Board	Chair – appointed by the Board but subject to consultation with Minister. In future the Board will have 4 Ind Ds – all will be appointed by the Board.	Chair – appointed by Board IDs elected by members CDs appointed by Board. Potential CDs must demonstrate experience and knowledge in activities of EWON. Nominations Committee makes recommendations of both IDs and CDs	Chair: Appointed by members following proposal from Nominations Committee IDs: Appointed by members. CDs are appointed by the Essential Services Commission and must be from consumer advocacy groups	Chair and Directors proposed by Nominations Committee. The constitution sets out the skills and experiences required to be considered by the nominations committee for all director posts. For CDs and IDs there will be an advert in a national newspaper	Chair – appointed by directors CDs appointed by Directors – must be able to demonstrate applicable consumer representative experience. IDs appointed by Directors.
Duration in post	Unstated in constitution	Chair – 3 years with possible extension of further 3 years Board members – 3 years.	Chair – 4 years with possible further 4 years Directors 3 years with possible further 3 years	3 years with possible further 3 years	Chair – 3-year term with possible further 3 years. Other directors unstated	3 years	3 year term but possible to serve 3 terms.
Date that its Constitution last reviewed.	2014	2018	2018	2018	2018	2018	2018
Method by which annual funding agreed	Members approval at a General Meeting	Members approval at a General Meeting.	Board decision	Board decision	Members approval at a General Meeting	Board decision	Board decision

Table 2: Comparison of director arrangements in consumer ombudsman

⁴ The acronyms stand for: PTO – Public transport Ombudsman, EWOV – Energy and Water Ombudsman of Victoria, TIO – Telecommunications Industry Ombudsman, EWON – Energy and water Ombudsman New South Wales, UDL – Utilities Disputes Limited (utility CDR scheme in New Zealand), EWOSA – Energy and Water Ombudsman South Australia and AFCA – Australian Financial Complaints Limited

⁵ Turnover is used as a proxy for size of the organisation.

⁶ ID stands for Industry Directors, CD for Consumer Directors and Ind D for Independent Directors.

The chairperson and the three consumer directors are all appointees of the Minister for Public Transport for Victoria. The industry directors are to be appointed by members, although VicTrack, Southern Cross Station, TransDev, Rail Projects Victoria and the Level Crossing Removal Project are not included on the list of members from which members are able to appoint industry directors (Constitution, Paragraph 14.2). Industry directors are to be appointed by means of a rotation policy. Transdev is not currently on the rotation policy but has applied to be on it and thus, potentially, have an industry board member in the future. The constitution does not state how long non-industry directors shall remain in office. In practice, when appointing the chairperson and consumer directors the Minister will also determine the length of appointment. Industry directors are appointed for three years according to the PTO's Protocol for the Rotation of Industry Directors.

The Australian Institute of Company Directors (AICD) (2016a, p.1) states:

There is no perfect size for any board and optimal board size is influenced by many factors including:

- Size and complexity of the organisation and its business/ operations
- The diversity of the business lines of the organisation (geographic and functional)
- Cultural norms within the industry in which the organisation operates

The AICD (2016a, p.1) further states

More generally an organisation's board should be of sufficient size so that there are sufficient board members to:

- Discharge the board's workload
- Ensure an overall adequacy of skills and competencies
- Populate the board's sub committees (as applicable)
- Give a diversity of perspective to the board's deliberations
- Encourage engaged deliberations;

When considering the composition of a board, the AICD (2016a) argues that any board should have at least two totally independent members (two being the recommended minimum for small boards). The AICD (2016) also stresses the importance of ensuring that a Board has the right mix of skills, knowledge and experience within its members. It

states that the goal in 'selecting board members is to build a mix that can work as a well-rounded team of people each with an appropriate range of experience skills and attributes relevant to the purpose, needs and strategies of the organisation' (AICD 2016, p.3). Steffek et al's (2013) transnational Guide for Regulating Dispute Resolution suggest that close regulatory supervision of governance structures is required for CDR mechanisms, such as ombudsman schemes, because they are funded by industry leading to a perception of lack of independence. They suggest that a possible solution to this is to require at least equal representation of *consumer* representatives on governing boards.

Concern about the constitution of the Board and its independence were raised by many participants, particularly those from a consumer advocacy background. These concerns related to both industry and consumer directors. The concern relating to industry directors was based on the fact that they both fund the scheme as well as being representatives from bodies in jurisdiction. Indeed, one industry participant felt that because the scheme was funded by industry it could be perceived by the public not to be independent. It was felt by one consumer participant that industry representatives may constrain the ombudsman from fully carrying out her role. One industry board member told the review team that any potential conflict interest only really reared its head when it came to funding issues.

There was also concern about consumer directors as they are ministerial appointees. It was felt that this could also lead to constraints upon the activity of the ombudsman. In addition, one industry member suggested that ministerial appointees may not necessarily have the necessary skills and background required by the office and that non-industry members should be more connected to the consumer advocacy sector.

A review of the 'good governance principles concerning board size' produced by the AICD (2016a, p.2) suggests that the board size of the PTO is at the larger end for an organisation of its size and complexity. Taking together the views of the AICD and the

modernising trends of other Australasian consumer ombudsman, the review team suggest that the following apply to the construction of the board of the PTO.

There needs to be sufficient board members to carry out its functions but the total number of directors (including the chairperson) should be reduced to a maximum of six. This would place the board size at the upper end of board size for small Australian Stock Exchange companies, mid position for small not for profit boards and at the lower end of public sector boards (AICD 2016a, p.2). A board of this size:

- Is more in keeping with the size and complexity of the business;
- Recognises the limited business activities undertaken by the business and the limited sector in which it operates;
- Is in keeping with the developing cultural norms of its industry; and,
- Will reduce costs in this area allowing the PTO to expand its activities in other areas with reduced cost pressures for members. Each Board Member receives a fee of \$24,000 per annum.

It is recommended that the Board of PTO consider reducing its Board size to five members.

The issue of board composition is relevant to the independence and, of at least equal importance, the perceived independence of consumer ombudsman, from its funders. This perception is emphasised by the findings from the PTO's stakeholder survey and the EY Sweeney research which indicated concerns about the true independence of the PTO from members and government.

Earlier, there was consideration of the 'domain perception' of the PTO and that, one of the important elements of that perception, is that the PTO has to navigate is its trust and legitimacy in the eyes of service-users. The fact that the PTO is funded by the industry will in itself raise doubts concerning its independence among outsiders. With 50% of the directors being reserved for industry directors this perception is likely to be reinforced.

The consumer directors are appointed by the responsible Minister. The posts are not advertised within the state of Victoria and the basis of appointment will potentially be viewed by some with suspicion that appointees to such posts are politically influenced. The appointment of consumer directors by the Minister risks creating a perception of Ministerial control over the PTO. The fact that five of the ten members of the PTO (Public Transport Victoria, Rail Projects Victoria, the Level Crossing Removal Project, V/Line and VicTrack) are government owned in some form raises questions about the degree of independence of the Board if the Minister is then able to appoint the consumer directors. This is reinforced by the fact that an industry director from a government owned operator (V/Line or PTV) is also potentially able to be a board member.

Taken together, the fact that there is a risk of the PTO being perceived to be institutionally biased towards the interests of the industry, or that the Minister is able to exercise undue influence over the activities of the PTO through their powers of patronage, and that there is no guarantee that the board of the PTO will have a board comprising the requisite skills experience and competency, it is suggested that the approach to appointments to the Board of the PTO is amended.

In making this suggestion the review team are aware of two important factors: the current approach does not ensure that the Board of the PTO necessarily has people with the right skills and experiences needed to operate effectively and, secondly, the lack of independent directors. The AICD (2016a, p.2) states that 'Independence refers to directors who have true independence of mind in their deliberations as director'. In explaining this further the AICD (2016a, p.2) discusses the need for directors to have structural independence from the interests of those with a particular interest in the activity of the organisation. The review team would argue that industry and the government have such interests. In making this suggestion the review team are not intending to belittle the contribution made to the workings of the PTO by current or past board members.

From observation and discussion, it is perceived that Board members undertake limited activity to bring to the Board wider perspectives. One consumer director informed the reviewer attending the Board meeting that their role was to bring their personal perspective to the Board and that they did not feel that it was role to consult with other bodies or people prior to attending the Board. This is absolutely correct as the Board is currently established but strengthens the argument that there needs to be at least one Board member who has links into consumer interest groups to bring a balancing consumer perspective to the thinking of the Board. Research on consumer representation for the payments industry in the UK highlighted the value that consumer representatives can bring to decision-making and concludes that consumer representation should be viewed as part of an organisation's broader consumer engagement and communication (Brennan et al 2017b).

Similarly, at the Board meeting the industry directors updated the Board on issues relating to their own organisation but there was little about wider issues relating to public transport. Moving to a board where there is one industry member, who has to apply to be appointed by the members of the Board will, hopefully, act as a catalyst for that member to undertake wider industry scanning and to converse with other industry members to ensure that they can inform the Board of broader public transport issues.

It is recommended that as, well as reducing the Board from seven members to five members, the Board should be established on the basis of an independent chairperson, one industry director, one consumer director, drawn from consumer interest groups active in the area of public transport, and two independent directors.

Both EWON and TIO have nominations committees, the task of which is to undertake the initial stage of recruiting of potential directors and to nominate potential candidates to the Board for approval. The appointment of directors to the boards of AFCA and UD are now wholly the responsibility of the boards themselves. The ability of the Board to appoint its own directors and chairperson on the basis of proper competition will

increase the independence of the board, including crucially, its perceived independence.

It is recommended that the Board assumes responsibility to appoint directors. In implementing this change, the Board of the PTO should review the activities of consumer ombudsmen that have such a role and agree a revised process based upon their experience.

The Chairperson of the PTO should also be appointed by the Board following a recommendation from the nominations committee, but in this case the nomination should also be passed to the Department of Transport for consideration but not approval.

In implementing such changes there needs to be recognition of the fact that there will need to be a transition period of several years. It is suggested that current board members are allowed to complete their current term of appointment unless they voluntarily give up their post during the transition period.

One final point needs to be made regarding the appointment of board members. The Constitution of the PTO does not indicate the length of appointment for any director or the chairperson. Where it is stated in the constitutions of other consumer ombudsmen it is normally for an initial period of three years with the possibility of reappointment for a further three years.

It is recommended that the Constitution of the PTO be amended to include the length of appointment for both directors and the chairperson.

5.1.1 The position of the ombudsman

The last issue relating to the structure of the board is the position of the Ombudsman. Public service ombudsman roles normally have 'corporation sole' status. This means that the ombudsman office is a single legal entity occupied by a single individual, the

ombudsman, and that this ombudsman has absolute control of all decisions. With consumer ombudsman, there is normally an overarching organisation which appoints the ombudsman and to which the ombudsman is accountable. There are arguments for and against both models reflecting their comparative strengths and weaknesses.

Ombudsman undertake a dual role. Firstly, they are the ombudsman, the individual in charge of the complaint work undertaken by the office and responsible for the decisions that are made. However, they have a separate role as Chief Executive Officer for the organisation which brings with it a number of key organisational responsibilities, including fiduciary responsibilities. This role is often underappreciated and downplays the important role of the Ombudsman in wider Board responsibilities such as strategy and policy development and ensuring that the organisation is compliant with its internal and external responsibilities and risks. In recognition of these key organisational roles and responsibilities most organisational boards will include members of the executive although normally as a minority of members.

Given the size of the PTO, appointing 'executives' to the board would be inappropriate but there is an argument to recognise the dual role undertaken by the ombudsman though their inclusion on the Board as a member. In addition, if the Ombudsman is appointed as a member of the Board it will strengthen links between board and office. If this recommendation were accepted then the Board would comprise of potentially six members.

It is recommended that the Board consider appointing the Ombudsman as an additional sixth board member.

5.2 Role of the Board

A member of the review team attended a meeting of the Board of the PTO and spoke with the chair and two directors of the Board, one industry member and one consumer member. In doing so the reviewer was able to develop an initial impression of the functioning of the Board. The overall impression gained was that the Board was very

diligent in its compliance and conformance responsibilities but that it could do more in the development of corporate strategies and policies. The development of the Value Proposition is a major step forward in this regard and leaves the PTO well placed to build a strategy by which to deliver the aspirations contained within it. Once such a strategy is developed the nature of the accountability relationship between the Board and the Ombudsman and her staff should be clarified. A healthy relationship would set the ombudsman clear objectives related to organisational strategies and create an environment which allows the ombudsman to deliver them, within agreed risk parameters and clear lines of accountability, what Kirkham (2019, p.16) describes as 'control through oversight and transparency rather than prescription'.

In conducting its business, the Board meets six times a year and operates three committees:

- Strategy Committee – meets twice a year and consists of the chairperson, one industry member and one consumer member. A member of the review team was informed that one meeting of the strategy committee in 2018 had to be cancelled but was not rescheduled.
- Finance and Audit Committee – meets twice a year and consists of two consumer members and an industry member. It is chaired by a consumer member.
- Performance and Remuneration Committee – this meets once a year and consists of the chairperson, one industry member and one consumer member.

The AICD (2016) provides details on a large range of potential roles for a Board before stating that these roles can be consolidated into two broad roles:

- Overall organisational performance: including the development and implementation of corporate strategies and policies which enable the organisation to meet their constitutional objectives; and,
- Overall compliance/conformance: which includes ensuring that the organisation has systems processes and procedures which enable the organisation to comply

with its obligations and, also to ensure that there are appropriate risk management activities in place (AICD 2016, p.2).

The UK's Institute of Directors (IoD) has provided guidance on the tasks of the board together with indicators of good practice (IOD 2019). The key roles include the need for the Board to:

- Establish vision, mission and values
- Set strategy and structure
- Delegate to management
- Exercise accountability and be responsible to relevant stakeholders

Together these suggest that an effective board works closely with the senior members of the organisation to establish clear policies and strategies, set the risk appetite to which the board is prepared to accept, create headroom for the organisation to implement these strategies and policies as creatively as possible, but hold the senior members of the organisation to account.

It is recommended that the Board reviews its role in the development of organisational strategies and policies and work with the senior staff members to create a culture which encourages senior staff to implement these strategies and policies as freely as possible while being held to account.

One final point regarding the functioning of the Board needs making. It is noted that Utilities Disputes Limited (the New Zealand second-tier complaints body for energy, water and broadband) has established a set of advisory committees to support its work. There is one advisory committee for each of the utility sectors over which it has jurisdiction. EWON has a consultative council to carry out a similar function (EWON 2019). These advisory committees are intended to provide the Board with advice or recommendations, and a forum for consultation, and include both industry and consumer representatives (Utilities Disputes 2019, para 8.18). The establishment of such a committee would be a helpful mechanism by which the Board can inform itself of

issues relating to public transport from both a broader industry and consumer interest perspective. Such a committee would also ensure that members and consumer organisations have a direct conduit to the board of the PTO.

It is recommended that the PTO establish an Advisory Committee, consisting of relevant industry and consumer interests to support the work of the Board.

It is argued that the review team's recommendations regarding the Board structure and role meet the advice of the AICD (2016a, p.1). Thus,

- The Board will be large enough to discharge its responsibilities;
- The broader mix of appointments will ensure that there is appropriate skills and competencies on the Board whilst ensuring a broader perspective to its activities;
- Together with an advisory committee will enable the sub-committees to be appropriately populated;
- Reduce, if not remove, the perception of industry or governmental bias which should engender greater levels of trust and legitimacy in the organisation;
- Reduce the costs of the Board; and,
- Arguably, lead to a more effective and efficient Board as a result.

5.3 Funding of the PTO

Having considered the independence of Board members there is one further issue that the review team wishes to bring to the attention of the Board of the PTO. The current approach to approving the annual budget figure is that there is a budget committee, the Finance and Audit Committee, which agrees an annual budget for the forthcoming year, which then needs to be approved by the Board of the PTO and, subsequently, finally approved at a General Meeting of the industry members of the PTO. The review team was made aware that on at least one occasion, the General Meeting of Industry Members initially refused to approve the proposed budget figure, although it was approved ultimately. This power raises concern with the review team especially as, during the interviews with member organisations, the review team was told by some

participants that members would be happy with budget proposals as long as they were within a cost envelope identified by their organisation.

This situation creates a form of indirect control over the PTO by members and is indicative of the position identified by Gilad in her research on domain perception, where industry members of consumer ombudsman try to limit the activities of their ombudsman through the fact that they fund the organisation.

Clearly, the members have a legitimate interest in the costs of the PTO as they fund the office. However, providing members with a veto provides too much power to members and, thus, compromises its independence: if members are unhappy with the activities of, or proposals from, the board or ombudsman, then they can interfere with the money available to the office. Increasingly, consumer ombudsman schemes have delegated the responsibility for determining the annual budget figure to the Board, see Table 1, with the figure supported by a costed business plan which is part of delivering an agreed organisational strategy.

It is recommended that the requirement for members of the PTO to approve the annual budget figure at a general meeting is removed, with this responsibility being delegated to the Board.

5.4 Other governance issues

Mention is made of the PTV in paragraphs 5.1 (a) and (b) and 7.1(d). In these sections the PTV is afforded opportunity to influence the design of the complaints system.

Although the review team accept that the intention is benign, and has not seen any evidence of any inappropriate activity, it considers it inappropriate for a body in jurisdiction to have the right to influence the design, even in part, the second-tier complaints process. Thus, it is recommended that the role of the PTV, described in paragraphs 5.1(a) and (b), and 7.1(d) are removed.

It is recommended that references to the PTV or any subsequent replacement entity are removed from the Charter of the PTO.

Many industry-based consumer ombudsman schemes have some form of statutory basis (see for example, EWON, EWOV, TIO and UD). The PTO has no such basis, although it was established at the direction of the Victorian Government. This has implications for its long-term security. To recall the work of Gilad (2008) earlier, regulatory and ombudsman schemes have a constant struggle to maintain and interpret their roles and boundaries. They are susceptible to challenge on three fronts - consumers, industry bodies and competing regulator type bodies. Without robust leadership, and the use of resources, the lack of a statutory footing could make the PTO susceptible to these challenges. This would not be in the interest of consumers or industry. It is understood that this could be achieved by an amendment to the Victorian Transport Integration Act 2010.

It is recommended that the PTO discuss with the relevant Department and/or Minister the establishment of the PTO on a statutory footing.

Benchmark Three: Fairness

Principle: The procedures and decision-making of the office are fair and seen to be fair.

Purpose: To ensure that the office performs its functions in a manner that is fair and seen to be fair.

6.1 Procedural Fairness

While substantive outcomes appear to be of greater importance in ombudsman contexts than in other disputing contexts (Creutzfeldt 2014, 2016) it remains the case that when decisions are not in the complainant's favour the negative feelings that these generate can be mitigated through high levels of interactional and procedural justice. There is an extensive literature on this area. Organisational and service recovery literature favour a three-construct model of justice theory which consists of distributive justice (is the outcome fair?), procedural justice (is the process fair?), and interactional justice (was the individual treated well?). In contrast, socio-legal theory favours a two-construct model which combines the procedural and interactional justice elements. Our review adopted this latter approach exploring both the procedural and interactional elements following the approach of Van den Bos, Van der Velden and Lind (2014).

Process fairness include

- People need to know if a complaint has been made against them
- People have a need to understand what the case is against them
- Both parties need to be able to make their case and be given reasonable time to do so
- The decision should be made solely on the basis of the material available
- This decision needs to take account of the evidence and answers the complaint.

A review of the PTO Complaint Handling Manual and the sample of cases indicates that the PTO's approach to case handling is rooted in procedural fairness both in policy and in practice.

The basic precepts of interactional justice include

- I was treated in a polite manner;
- I was treated with respect;
- I was able to voice my opinions;
- My opinion was seriously listened to;
- I was treated in a just manner;
- I was treated fairly;
- The public officials with whom I interacted were competent; and,
- The public officials with whom I dealt were professional (Van Den Bos, Van Der Velden, and Lind 2014).

Listening into calls between caseworker and complainant, and from a review of the written material in the case files, this indicates that caseworkers performed highly against these statements. This is particularly important as high levels of interactional justice are important in maintaining confidence in the service especially when the decision is not in the complainant's favour. One important area for consideration is whether caseworkers could spend more time verbally discussing the case with the complainant as opposed to written communication. A qualitative review of consumer ombudsman ADR schemes in the UK highlighted the importance consumers place on being able to participate effectively and being able to speak to someone (Gill et al 2016).

One area that requires change relates to the situation where two parties hold differing versions of events. The review team observed that caseworkers will acknowledge this difference before moving their focus onto discussion about both parties' roles, perceptions of the events, the individual circumstances of the complainant and what might resolve the complaint. According to the PTO's investigation processes, physical evidence such as CCTV footage or call-centre recordings will be gathered from the operator, and statements from operator employees involved in the events requested. The review team was informed that while the consumer and any witnesses relied upon by the consumer will be interviewed, caseworkers don't conduct similar interviews with relevant operator witnesses or participants in the events. In cases where resolution

cannot be agreed, leaving differing versions of events uncontested increases the likelihood of consumer dissatisfaction with the process or making a wrong decision.

It is recommended that where versions of events differ on significant points, in seeking further evidence by which to take a view, caseworkers conduct interviews of all relevant witnesses or participants, enabling the caseworker to establish a view on the weight that should be given to the competing versions, thus helping make a robust decision.

6.2 Fair and reasonable test

Distributive justice is concerned with two things. Firstly, was the correct decision reached? And, secondly, what was the final remedy?

Some consumer dispute resolution and consumer ombudsman schemes decide cases on the basis of the law – examples are WATRs in the UK and ombudsman schemes in Germany, but most consumer ombudsman schemes reach their decisions based upon what is fair and reasonable in the overall circumstances, taking the law into account. This move is supported by two logics: firstly, the law, regulations or legal contracts will often require the provider to treat their customers fairly and, secondly, in western society there is the increasing importance of fairness as a basic element of the social contract (Hodges in Hertogh and Kirkham 2018, pp.64-65).

One of the strengths of consumer ombudsman schemes is that they can go 'beyond the law' and look at the issue in a more rounded fashion. For Wheeler (2014), the former Deputy New South Wales Ombudsman (2014, p.12), one factor that drives public trust in agencies will be their perception of whether the agencies have acted fairly and reasonably. Wheeler (2014, p.12) further suggests the objective of the fair and reasonable test is aspirational, 'directing consideration towards approaches or outcomes that are perceived to be morally right and in accordance with accepted standards of conduct'. Thus, it is more than whether or not a body acted in technical accordance with the law, regulations or code of conduct.

In effect, bodies are held to 'two related but distinct standards: have they complied with the relevant laws, codes of practice and regulatory guidance: and is the outcome fair and reasonable in all the circumstances' (Allen and Overy 2017). The role of the PTO is not to judicially review the treatment of customers and the public by members 'but to decide for itself whether that treatment was fair and reasonable in all the circumstances' (Allen and Overy 2017). In practice, this means explicitly considering both the fairness and reasonableness of the actions and impact of these actions by the relevant member.

In reaching decisions the PTO uses the fair and reasonable standard by which to reach decisions and to determine any remedy - 'having regard to what is fair and reasonable, good industry practice and the law' (PTO 2014, p.15). To assist caseworkers the PTO has described some of the factors that need to be taken into account when making a fair and reasonable decision:

1. 'any applicable laws or regulations, including any judicial precedent;
2. any operator Codes or Charters or operating policies or procedures;
3. the observed good practices of other public transport operators;
4. any expert advice, including independent technical, legal, regulatory or medical advice;
5. our informed view of the case, having regard to previous cases about similar issues or relevant PTO position statements;
6. practice in other industry ombudsman schemes;
7. special consumer circumstances and how they impact the individual complaint;
8. what the ordinary person would think is fair and reasonable; and
9. the handling of the complaint prior to and during our investigation, by both the consumer and operator, including customer service issues.' (PTO 2014, p.15)

These factors are a sound basis upon which to base the fair and reasonable test.

However, on review of the cases an impression by the member of the review team was gained that caseworkers, when using the fair and reasonable test, tend to take a fairly

legalistic approach to its implementation. That is, caseworkers would look at what the law, regulations or other similar type of standard stated and use that as the basis of their determination. This was particularly the case concerning complaints about the environmental impact of the activities of PTO members. It is accepted that this is a complicated area – PTO members are conducting activities that are essential to the maintenance and operation of a safe efficient public transport system. These activities create externalities and unfortunately a small number of people may be disproportionately affected by these externalities. When they raise the complaint efforts, often successfully, are made by the PTO staff to broker a conciliated agreement. But, in doing this, too much reliance is placed upon the legislation and regulations affecting these activities and not enough on the impact of their externality.

In other cases, if there was no applicable law or regulation, they may look at what other organisations in the public transport industry may do in similar circumstances. In doing this, the caseworker is at risk of not applying the fair and reasonable test appropriately as they do not pay sufficient attention to factors seven and eight in the PTO guidance (PTO 2014, p.15). This is particularly relevant when considering the appropriate remedy. In many cases the appropriate remedy is straightforward, but in some complaints, particularly those involving environmental detriment, the use of these factors become particularly relevant.

It is recommended that the PTO keep under review its approach to the fair and reasonable test and its use by casework staff.

Benchmark Four: Accountability

Principle: The office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators.

Purpose: To ensure public confidence in the office and allow assessment and improvement of its performance and that of participating organisations.

At its most simple level the PTO meets the requirements of the Benchmark on accountability. However, the accountability of the PTO can be considered in three levels: towards members as a membership organisation and exercised through governance arrangements, towards the public and exercises through fair complaint handling and transparency and towards the government through its contribution in improving the public transport system in Victoria.

One consumer participant suggested that the balance of accountability was 'tipped the wrong way' – towards industry and not the public. The PTO does have clear lines of accountability towards its membership through the appointment of industry members and the constitutional requirement for general meetings. The constitution details areas that require the PTO to obtain ministerial approval. The Minister is able to appoint consumer directors and the chairperson. Thus there are lines of accountability between the PTO and government. However, public accountability is met through transparency in its actions and the publication of material on its activities.

Operators and the government may have concerns that increasing transparency will raise adverse publicity about them and the broader public transport system, but experience gained in England from the PHSO indicates that where the body concerned has been involved in the development of the solution then the media tend to focus on the improvements and not the problem. An example from the PTO occurred when the Victorian Government removed the Penalty Fare following criticism in the PTO's Annual Report.

The review team is of the view that more needs to be done. Publishing and promoting its activities, and in particular the results of its systemic activities, will demonstrate to the public, operators and government of the value of the PTO in contributing to the improvement of the public transport system. The establishment of an Advisory Committee will also help demonstrate accountability towards both members and the public.

It is recommended that the PTO publishes more of its complaints data, decisions, particularly the result of systemic investigations along with information about its other activities.

Benchmark Five: Efficiency

Principle: The office operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

Purpose: To give the community and participating organisations confidence in the office and to ensure the office provides value for funding.

8.1 The Public Transport Complaints System in Victoria

The current complaint system for public transport complaints in Victoria is shown schematically in Figure 2.

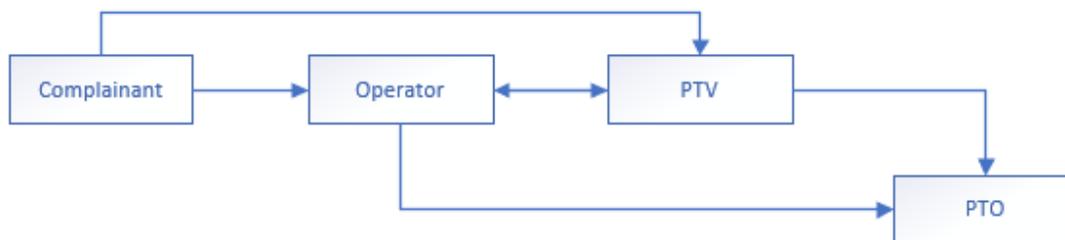


Figure 2: The current public transport complaints process in Victoria.

The review team understand that if ticketing complaints arise then they are under the jurisdiction of the PTV, while operational complaints are the responsibility of operators. However, the PTV is able to consider complaints about operators. The way that the system currently functions is that, theoretically at least, a complainant could raise a complaint about an operator, which is then passed to the PTV, who may refer it back to the operator for further action, before returning again to the PTV before final consideration by the PTO. This is a complicated complaint model and is worrying as there is general consensus that complaints systems should be as simple as possible for complainants (see for example PHSO 2009, SPSO 2011). Every additional step increases the likelihood of complainant fatigue and that justified complaints and learning opportunities for operators are lost. On its website, the PTV does mention the role of the

PTO in resolving complaints about public transport ahead of its own potential role but this inclusion does little to clarify the confusing complaint model that exists.

The review team, while accepting that the ToR of the review was to review the PTO and not the wider public transport complaints system, nevertheless are of the view that problems with the overall complaints system may impact upon the role and reputation of the PTO itself, and thus are appropriate for comment and recommendation.

It is recommended that the potential for complainant confusion, dissatisfaction and complaint fatigue be reduced by removing the role of the PTV from the complaints process other than for those issues for which they have sole responsibility.

It is recommended that the PTO should liaise with the PTV about the provision of data which the PTV would find of assistance in its role as provider, co-ordinator and promoter of the public transport system in Victoria.

It was recommended that the overall complaints system be simplified. Figure 3 below indicates the preferred proposed public transport complaints system which provides members with the opportunity to resolve complaints but, where, if this is not possible then the complainant would contact the PTO. It creates a simpler, cheaper, more easily understood and quicker complaints system benefitting all parties.

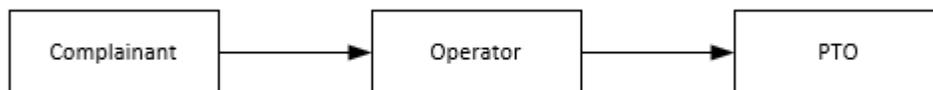


Figure 3: Proposed public transport complaints model

Once the complaint reaches the PTO a multi-stage approach is adopted by casework staff. This approach is common to consumer ombudsman schemes in Australia. This is shown diagrammatically in Figure 4 below:

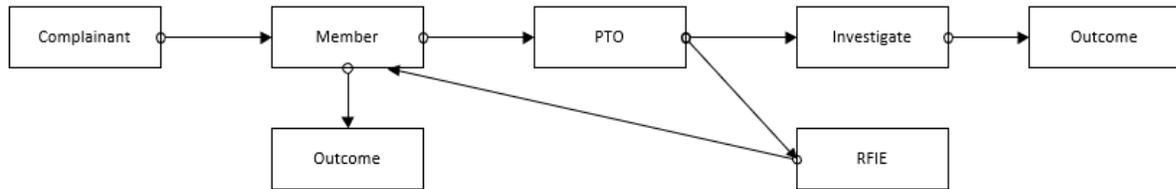


Figure 4: Current process once complaint reaches PTO

It is appropriate and proper for the PTO to refer a person with a complaint to the operator if they have not previously approached the operator. However, it is noticeable that the PTO treats approximately half of the complaints that it receives as RFIEs – in 2017/18 the PTO treated 504 complaints as RFIEs and accepted 595 for investigation (PTO internal information). Research by Casado-Diaz et al (2007) demonstrates that if an organisation suffers a service failure, or ‘single deviation’, then its response to any subsequent complaint is of vital importance – failure to resolve it appropriately results in a ‘double deviation’ which is damaging to the organisation. Institutionalising second, or even further, opportunities to resolve a complaint may lead to organisations not maximising their first opportunity at complaint resolution.

In practice this means that a complainant has suffered a service failing of some form (real or perceived) and has submitted a complaint. Dissatisfied with the response from the member, it approaches to the PTO to be referred back to the organisation that has, in the eyes of the complainant already failed it twice. The onus is placed on the complainant to come back to the PTO should they remain dissatisfied with this second response. No data is collected to establish how many revert to the operator, how many pursue the complaint and how many are ultimately satisfied or return to the PTO.

It also has consequences for the PTO. A review of customer satisfaction with the PTO in its handling of both RFIEs and investigations demonstrates a sharp drop in satisfaction levels when one compares satisfaction levels of RFIEs compared to those of investigations. Table 3 below demonstrates this reduction in satisfaction:

% agreeing with the statement	RFIE	Investigation
I feel that my complaint was taken seriously	64	88
The PTO took my personal experiences and circumstances into account	62	80
The PTO was knowledgeable about public transport issues relevant to my complaint	65	83
The PTO had skills that encouraged a fair hearing and efficient progress of the matter	65	90
How satisfied were you with your interaction(s) with the PTO	64	90

Table 3: Comparison of satisfaction for RFIEs and investigations

Responses for complaints handled as an RFIE were consistently lower than those cases where the PTO investigated the complaint. Such scores are not in the interest of either operators or the PTO.

8.2 Review of investigations

A review of cases shows that the majority of cases are dealt with by shuttle conciliation. In some cases, where conciliation is not achieved, the caseworker will move to case assessment – this process is used where a caseworker is of the view that a complaint has been fully investigated by the PTO, or a fair and reasonable offer has been made, but the consumer remains dissatisfied. This assessment is then reviewed by the Operations Manager before closure of the case (PTO Complaint Handling Manual 10.7.8). In the absence of a conciliated agreement and after sufficient investigation, the Ombudsman may make a binding decision (PTO Complaint Handling Manual 11.1). However, the PTO has only recorded one binding decision in its fifteen years of

existence. The low level of binding decisions differs from ombudsman schemes in the UK. Early resolution and conciliated outcomes are a key feature of UK schemes too. However, a much greater proportion will result in a binding decision (Bondy et al 2014).

A review of a sample of cases indicated a number of cases where the caseworker persevered in attempting a case settlement. Sometimes this was caused by the intractability of the complainant. In these situations, the caseworker would move to case assessment to close the case. There did, however, appear to be a reluctance to force the issue when the operator was the intractable party. This meant that the caseworker had to continue the negotiation with the operator to achieve an appropriate outcome. In the majority of cases reviewed where this was an issue the caseworker did eventually achieve the appropriate outcome. The intractability, therefore, only resulted in delay for the complainant, and increased costs for operator and the PTO.

It is entirely correct that conciliation is the primary method to resolve the majority of complaints considered by the PTO. Where the complainant is being unreasonably intractable the case assessment procedures are an appropriate method to bring closure to the case while protecting the rights of the complainant, through the case being reviewed by a second, independent, more senior member of staff. In cases where the operator is being intractable there should be a similar case assessment approach, which reaches an adjudication on the case and a decision recommended by the caseworker. This may be accepted by the operator or, if not, the case should be referred to the Ombudsman for consideration. This should result in speedier resolution of complaints and reduced costs for operator and the PTO.

It is recommended that the PTO review its complaint handling process to clarify the process for when a case should move from attempted conciliation to case assessment and ultimately adjudication.

It is recommended that the PTO reviews its criteria by which it decides whether or not to treat a complaint as a RFIE or as an investigation. Should a complaint be

treated as an RFIE, there should be more active follow up by the PTO with the complainant of action taken by the operator.

8.3 PTO as design authority

In regulated industries the regulator is likely to have responsibility for the design and monitoring of the complaints system. There is no formal regulation of the public transport system in Victoria, although as its name suggests it is a public service and does receive large levels of public investments. This leads to a broader issue that is worthy of consideration.

Many public sector ombudsman now have responsibility to act as a design authority for the complaints system. This can be a formal part of its roles and responsibilities (see the Scottish Public Services Ombudsman, the Northern Ireland Public Services Ombudsman or the Public Services Ombudsman for Wales) or an informal role adopted by the ombudsman as part of its collaborative working with bodies in jurisdiction (see the New South Wales Ombudsman and the Commonwealth Ombudsman). The PTO undertakes some activity in this area which could be categorised as working with members on complaint handling, but given its overview of the complaints system, the specialisation and training of its caseworkers there is scope to extend this function further. In that case the PTO could become the design authority for the public transport complaints system working with the customer services and/or complaints teams of members to design an effective complaints system.

The Scottish Public Services Ombudsman publishes detailed public information on its approach which could act as a model for the PTO to work with operators to develop model complaint handling procedures - these ensure that there is a common approach to complaint handling by all bodies yet allows room for individualisation suitable to the needs of individual bodies (SPSO 2019). The intention of this recommendation is to reduce the number of complaints received by the PTO for investigation.

It is recommended that, based upon its expertise and knowledge, the PTO should lead the system in designing a good complaint system.

8.4 Assessing Performance

As part of its compliance activities the Board of the PTO receive an Ombudsman Report which contains details of the performance of the Office against its four key performance indicators. The indicators are:

- 95% of non-investigated cases closed within 3 days
- 70% of investigated cases closed within 45 days
- 80% of investigated cases closed within 60 days
- 90% of investigated cases closed within 90 days

The Annual Report does not report on its performance against these indicators.

The identification of key performance indicators is always a challenging issue for ombudsman and there is, not uncommonly, a tendency to focus on speed of casework or cost of the office and casework. The problem with this approach is that it focuses on only one activity of the office and then only in one dimension.

There have been several papers published that suggest how ombudsmen schemes can assess their effectiveness and impact. Marin and Jones (2011) undertook a review of the typical performance measures used by members of the Asian Ombudsman Association, and other work published by Bizjak (1999), Stuhmcke (2012) and Danet (1978), make proposals on how the effectiveness and impact of ombudsman schemes can be assessed.

The work of a dispute resolution scheme is complex, as its work consists of much more than simply the handling of complaints. It includes a role to contribute to the improvement of the overall system in which it exists and the management of the expectations of complainants. A final role for alternative dispute resolution schemes is that they should contribute to the improvement of public trust in the overall system in

which they operate. For these reasons, an over-emphasis on the performance of individual complaints will provide a very limited picture of the overall performance of the scheme.

Danet (1978) was one of the first to consider how to measure the performance of an ombudsman office and split her indicators into three groups which include customer focus, member focus, and an office focus. It is suggested that this is a logical approach by which to consider performance indicators. Using Danet's three-part classification potential performance indicators could be:

8.4.1 Office focus

1. % of cases closed within a given time frame
2. Number and closure type of cases
3. Number of systemic investigations completed

According to Danet (1978) the combination of the number of files closed together with the speed of handling will provide an indication of efficiency.

8.4.2 Customer focus

- customer satisfaction survey
- unprompted and prompted awareness
- Level of outreach activities undertaken.
- Number of complaints by socio-demographic group

8.4.3 Member focus

- satisfaction surveys of members

It is important that contextual information relating to the five roles of a modern consumer ombudsman is also provided to ground the KPIs.

It is recommended that the Board of the PTO review its set of performance indicators with a view to developing a more holistic view of office performance.

It is recommended that the PTO provides detail of its performance against its KPIs in its Annual Report

Benchmark Six: Effectiveness

Principle: The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.

Purpose: To promote community confidence in the office and ensure that the office fulfils its role.

9.1 The Public Transport Ombudsman

Paragraphs 1.3 and 1.5 of the PTO Charter describe the mission and aims of the PTO. Both make reference to the investigation and resolution of complaints and disputes which emphasises the importance of individual complaint resolution to the PTO. This is how it should be, but in, and of, itself represents a traditional view of the role of a CDR scheme and, arguably, fails to make the most of the opportunity provided by the provision of such a scheme to benefit the industry and consumers more widely. Attention is drawn to the five functions of modern CDR schemes discussed on pages 20-21. In summary, the five potential functions of a modern CDR scheme are to:

1. Provide consumer advice.

The PTO provides an advice service to callers – in its latest Annual Report for 2017/2018 it is reported that approximately one third of the approaches received by the PTO are for the provision of advice or information (PTO 2018, p.5). In addition, many of the complaints that it receives are referred back to operators, indicating that it does provide advice on the public transport complaints system. This indicates that it already undertakes an advisory service.

2. Resolve individual disputes.

The consideration and resolution of complaints is a primary role of the PTO as illustrated by this review.

3. Undertake data analysis to identify issues and trends.

The PTO currently undertakes data analysis and some industry participants felt that they found this of value and would like to see it more systematically produced and provided to them. They stated that this would enable them to look for areas of service improvement. It is suggested by the review team that this information is not only produced and provided to members but is also published on its website. Many other consumer ombudsman schemes do this and in doing this the PTO will increase the transparency of its activity, demonstrate its independence and improve its accountability to the public.

4. Publish data to provide feedback to consumers, the industry, regulators and other stakeholders.

See above

5. Improve market behaviour.

The PTO undertakes some systemic investigative activity which is aimed at improving the services provided by members. The PTO issues decisions based on the fair and reasonable test, thus taken together, the PTO is active in supporting the improvement of service provision by members.

It is recommended that the mission and aims of the PTO and contained within the PTO Charter should explicitly incorporate each of the five functions of a modern CDR scheme as part of its formal role.

It is recommended by the review team that the data analysis conducted by the PTO on complaints is not only produced and provided to members but is also published on its website.

9.2 Jurisdiction

A key issue relating to the effectiveness of the PTO is whether the scope of the office's jurisdiction is appropriate (Australian Government 2015, p.21). The review team noted that there are a number of issues relating to the jurisdiction of the PTO which impacts upon its overall effectiveness. The EY Sweeney survey (2018) indicate that in questions to informed participants relating to the clarity of the scope and jurisdiction of the PTO, the total combined 'strongly agree' and 'agree' scores were only around the 50% mark while 'strongly agree' scores were typically in single digits. Consumer participants also indicated a lack of clarity about the scope and jurisdiction of the PTO.

Mention is made of the PTV in paragraphs 5.1 (a) and (b) and 7.1(d) in the PTO Charter. In these sections the PTV is afforded opportunity to influence the design of the complaints system. Although the review team accept that the intention is benign, it considers it inappropriate for a body in jurisdiction to have the ability to influence the design, even in part, of the second-tier complaints process.

Paragraph 1.8 of the PTO Charter considers the role of the PTV. Although, currently, the PTV plays a significant role within the public transport system in Victoria, it seems anomalous for a section of the Charter of the PTO to be dedicated to this one organisation. This is emphasised by the fact that paragraph 1.8 spends significant time outlining the role of the PTV and, thus, makes no contribution to the workings of the PTO itself. Of particular concern is that part of paragraph 1.8 which affords the PTV the ability to handle complaints against public transport operators.

It is recommended that the role of the PTV, described in paragraphs 1.8, 5.1(a) and (b), and 7.1(d) are removed.

Paragraph 1.7 of the PTO Charter discusses the boundary between the PTO and the Victoria Ombudsman. It is noted that there is overlapping jurisdiction between the two bodies and that, to resolve this, there should be an MOU between the two bodies. The

problem with this approach is that it recognises, yet firmly entrenches the fragmented complaints system with relation to public transport complaints. Dunleavy et al (2010) discuss how complainants see their complaint as a single whole yet find themselves faced with a fragmented complaints system. This leads to complaints fatigue, where complainants with legitimate grievances take no further action, or undertake forum shopping where complainants take their complaint to several bodies, or try to choose the body which it thinks will be most receptive. Both situations are not ideal and reflect the fragmented complaints system

It is also worth returning to Gilad's work on domain perception where she discussed the tendency for organisations to seek discrete coherent territories over which they have primacy. In relation to complaints this is important. Mention has been made of fragmented complaints system and the problems that this creates for complainants who see their complaint as a single whole. There is substantial evidence that the public transport complaints system in Victoria is fragmented – the PTV has an unclear but duplicating role with the PTO as second-tier complaints resolver; overlapping jurisdictions between the PTO and the VO; complications relating to complaints about the issuance of TINs but where there are issues about the conduct of the AO at the time of issuance; and that there is a second complaints body for taxi and ride-share complaints. For some types of complaint there is no review body to which a person can take an unresolved complaint such as ferries or the operation of airports.

9.3 Authorised officers

Authorised Officers are employed by public transport operators to check tickets, provide travel information, improve public safety and to provide assistance during special events and/or disruptions. There is shared responsibility with the Victoria Ombudsman for the management of complaints about Authorised Officers (PTO Charter 3.1(d) and (h), 4.2(i)). The review team understands that the Victoria Ombudsman will consider more serious complaints against Authorised Officers, such as allegations of assault or the infringement of human rights. There is also a shared responsibility in relation to Transport Infringement Notices (TINs). Complaints about conduct can be considered by

either the PTO or the VO, while appeals against fines resulting from the same incident are dealt with firstly by the DoT and then the Magistrate's Court.

Between January 2016 and June 2017, the PTO received 967 complaints about Authorised Officers (AOs) concerning issues about reports by Authorised Officers of non-compliance, the conduct of AOs, or an infringement notice or a fine. Many of the complaints received concern multiple issues, such as intimidating behaviour on the part of the AO, a refusal to show identity and/or a refusal to discuss the issue with the complainant properly. The complainant nonetheless receives a Report of Non-Compliance which can lead to a fine issued by the DoT. There are then separate processes for the complainant to follow up their complaint about the conduct issues relating to the AO and any appeal against any fine that had been issued by the DoT. The DoT has an internal appeal process against the issuing of a fine and, if the person who receives a fine, wishes to appeal further they have to take action in a Magistrate's Court.

In 2016 the Victorian Government commissioned a review of public transport ticketing compliance and enforcement (Australian Government 2016). Among its findings it noted that there were continued criticisms about the conduct of AOs and frustration about the processes which support the infringement notice system with long delays and scepticism that individual circumstances have been fully taken into account.

This creates a difficult situation for the complainant as they need to pursue differing avenues to resolve what is, to them, a single complaint. Many ombudsman schemes have the ability to exercise discretion to consider complaints that are multi-faceted, and where one of the facets may be dealt with by another forum. An example is the Parliamentary and Health Service Ombudsman in England (PHSO), which on receipt of a complaint, has to formally consider whether there is a suitable alternative legal remedy for the complainant to take. If there is then the expectation is that the PHSO should refer the complainant to that forum. However, if the PHSO can demonstrate a

Wednesbury compliant argument as to why it would be reasonable for it to handle the issue, then it would be lawful for it to do so.

Areas where it may be appropriate for the PTO to exercise such discretion relate to two areas. Firstly, there is a 'Special Circumstances List' held at the Magistrates Court. People may be eligible to have their fines reviewed if they can demonstrate that they had special circumstances at the time that they were fined. Examples of special circumstances include, if the individual

- had a mental or intellectual disability, disorder, disease or illness, including anxiety and depression
- had a serious addiction to drugs, alcohol or volatile substance – this includes marijuana or alcohol, as well as drugs such as heroin, ice, speed or ecstasy
- was a victim of family violence
- was homeless – they were living on the streets, did not have a stable place to live for a long time or were couch surfing

Secondly, exceptional circumstances would include the type of issue identified in the review of the public transport ticketing compliance and enforcement report. The PTO is currently unable to consider Transport Infringement Notices. To enable the PTO to exercise its discretion over some complaints involving TINS would require not only changes to the Constitution and Charter but also legislative change (the Transport Integration Act 2010).

It is recommended that the PTO should be able to exercise discretion in multi-faceted complaints, including some complaints about TINS, where there are special or exceptional circumstances.

It is recommended that the PTO discuss with the DoT the issue of it having the ability to take on complaints about travel infringement notices in certain circumstances.

9.4 Other jurisdictional issues

There was consideration earlier in the paper concerning the public transport system in Victoria (pages 14-15) where it was noted that the Victorian government recognises the intrinsic interrelationship between the different elements of the public transport system and infrastructure. The Yarra Tram service functions on roads and improvement activity on roads could affect its operational capability. People's journeys are increasingly multi-modal. Despite this, the jurisdiction of the PTO only extends to bus, train and tram operators, and some of the rail related infrastructure projects. Major road infrastructure projects, such as the West Gate Tunnel or the North East Link among others are not included. It is hard to fully understand why these projects are not included within the jurisdiction of the PTO. One industry member made the point that public transport is a network and that buses and trams both run on roads. The successful delivery of tram and bus services depends upon the reliability of the road network. For that reason this participant suggested that VicRoads should become a member of the PTO.

It is recommended that the PTO discuss with the DoT the inclusion under its jurisdiction both Vic Roads and all infrastructure projects being developed under the auspices of Victoria's Big Build.

Many people use taxi services or other forms of ride-share transport. The Commercial Passengers Vehicles Victoria (CPVV) is the newly established regulator responsible for taxi and car hire services in Victoria. Its web page 'About Us' lists the key functions of the CPVV but does not list complaints as one of its key functions (CPVV 2019). That is not a criticism of the CPPV but, presumably, is recognition of its priorities. Two, inter-related, issues arise – is it correct for a regulator to consider complaints, and, should there be two differing bodies considering complaints about different parts of the public transport system, particularly when for one of the two bodies it may not be a priority. The idea that the PTO should assume responsibility for complaints about taxis and rideshares was commonly raised by consumer participants.

The PTO is the appropriate body to assume the role of the second-tier public transport complaints body as it has become an important, accepted and respected part of the public transport ecosystem. This would require the PTV to withdraw from second-tier complaint handling activities; the PTO to assume responsibility from the CPVV for taxi and ride-share complaints; the PTO to assume responsibility for complaints about AOs and to have discretion about complaints concerning the issuance of TINs where there are exceptional and/or special circumstances.

There would be merit for the PTO to consider extending its remit to cover all transport related complaints such as ferry complaints, complaints arising from the redevelopment of Tullamarine airport and complaints about road tolls. The review team is aware that there is a Tolling Customer Ombudsman, but also note that this scheme is not a member of ANZOA. It is possible that it would not be able to meet the requirements of membership of ANZOA (Toll Redress 2017).

It is recommended that the PTO is established as the single public transport complaints body which enables easy access by complainants to a single body able to deal with almost all their complaints.

If this is accepted, then the PTO should consider changing its name to some name such as the Travel Complaints Ombudsman or Travel Complaints Commissioner, for example.

The review team was informed that complaints about the Free School Bus Service were ruled out of jurisdiction as this type of complaint is excluded by the PTO Charter, the likely intent of this being to recognise the reality that it is the Department of Education that plays the major role in designating zones and eligibility for free school bus travel, and liaising with local schools and communities rather than PTV or the Department of Transport. The review team were also informed that, while the service was established to provide free bussing to certain categories of school pupils, the service now accepts fare-paying school pupils as passengers. This creates a potentially anomalous situation

where a fare-paying school pupil may or may not be able to complain dependent upon which bus service they use to get to school.

It is recommended that the PTO discuss with the Department of Education whether there is a second-tier complaints service for those using free school bus services, and, if there is not, it is further recommended that the PTO should become the second-stage complaints operator for those services.

9.4 Binding Limits

Paragraph 6.1(b) of the PTO Charter sets out the binding limits that apply to ombudsman decisions. They currently are set at \$5,000 for a binding decision, although this can be raised to \$10,000 with the consent of all parties. These figures have not been increased since the establishment of the PTO 15 years ago. The review team were specifically asked to consider whether these limits reflect the nature of the complaints that may be considered by the PTO in the future. Undoubtedly, when the PTO was established 15 years ago the nature of the complaints considered would be different to those actually being considered today. This is because this was pre- Big Build and bodies such as the Level Crossings Removal Project and Rail Projects Victoria had not been established let alone become members. The review team, in its review of cases, identified several cases where the cost of an appropriate remedy may be in excess of these limits. In addition, there was common agreement from both industry and consumer participants that the level of binding limits should be raised. The setting of the binding limit at \$5,000 could potentially act as a barrier to the PTO receiving legitimate complaints.

It is recommended that the PTO reviews its binding limits.

9.5 Systemic investigations

According to EY Sweeney (2018, p.9) there is little public knowledge concerning the PTO's ability to use feedback to 'shape policy changes and make public transport improvements' although people who did complain wanted the complaint to lead to

improvements (EW Sweeney 2018, p.16). A key activity of the PTO, as with other consumer ombudsman is its systemic investigations. The Benchmarks (Australian Government 2015, p.21) highlight the importance of industry-based customer dispute resolution schemes to deal with systemic issues. The Annual Reports of the PTO provide examples of systemic issues identified and acted upon by the PTO.

Consumer participants were very positive about the ability of the PTO to undertake systemic activity with it being described as ‘the ability to shine a light on problems’. Despite this, there was some concern expressed to the review team from industry representatives about systemic investigations. There were two inter-related aspects: operators were not always clear about the process and criteria by which a complaint may result in a systemic investigation, and operators were not always convinced about the appropriateness of the decision to establish a systemic investigation. One industry participant questioned the resource need to conduct a systemic investigation when it may not be a priority for the operator. Against that view, a second industry participant suggested that they were an opportunity for gaining support to fix an issue and that the real value of the PTO is in it making step changes in the improvement of services rather than making individuals happy.

The PTO has produced a Systemic Issues Policy and Procedure Manual to guide the work of caseworkers which has been benchmarked against the approaches adopted by comparison ombudsman. This manual sets out a robust but interactive approach to systemic investigations. It is one, though, that places the onus on the operator to conduct the investigation and to provide potential solutions to the PTO. One can understand that these may be onerous on the operator’s customer service team and this may lead to some of the disquiet.

There are at least four approaches to systemic activity that can be undertaken by ombudsman:

1. Publication of data: the analysis and publication of data, highlighting trends or specific areas of complaint can be helpful to operators improve services.
2. Publication of themed reports – here the ombudsman identifies a recurring subject of complaint, which may be across operators, such as disability access and produces a report which has this subject as its theme. The subsequent report provides case examples as way of illustration of the issues involved. They could leave the subsequent response to the report open to the operators, as with Care and Compassion (PHSO 2011) or work with the operators on the systemic improvements that will result, as with Action on Sepsis (PHSO 2013).
3. Conducting systemic investigations in line with the current approach adopted by both the PTO and other consumer ombudsman.
4. The PTO conducts the systemic investigation in its entirety. Rather than pass the complaint back to operators, the PTO conducts the investigation and works with operators on solutions to its findings. This may be appropriate for those issues that affect more than operator.

There are numerous examples of themed reports from public sector ombudsman schemes in Australia. Adopting a broader approach to systemic activity to include the analysis and publication of data as well as operator and PTO led systemic investigations will create real added value to the complaints system. It will lead to more numerous improvements in the public transport system resulting in greater confidence not only in public transport, but also in members and government.

The New Zealand Banking Ombudsman has published a paper detailing its approach to systemic issues which the PTO may find of interest (New Zealand Banking Ombudsman ud).

It is recommended that the PTO revises its approaches to systemic investigations to adopt a broader range of approaches, ideally all four detailed above, and work with operators on the development of this policy.

Appendix One - Members of the review team

Dr Gavin McBurnie

Dr Gavin McBurnie worked at the Parliamentary and Health Service Ombudsman (PHSO) where, over seven years he led on a number of senior director level roles. Gavin was the lead consultant on the five-year review of Utilities Disputes Limited and a member of the team that conducted the review of the post-company complaints system for water and sewerage companies in England and Wales. He acted an independent external adviser to the Welsh Assembly as it considered proposals to develop the role of the Public Services Ombudsman for Wales. He has delivered training on complaint handling on behalf of the International Ombudsman Institute for the Caribbean Ombudsman Association, and for Greek civil servants on behalf of the Organisation for Economic Co-operation and Development.

Gavin originally trained as a doctor at Glasgow Medical School before returning to Edinburgh University to study for an MBA. Following this he entered health service management where he held a number of director roles within the NHS in both Scotland and England. Gavin has also studied for an LLM at de Montfort University in Health Care Law and is currently studying for a PhD at Queen Margaret University on the methods used by health ombudsmen in their 'system improvement' role.

Jane Williams

Jane Williams is a Senior Lecturer in Dispute Resolution at Queen Margaret University in the Consumer Dispute Resolution Centre. Her current research focuses on consumer experiences of complaint handling in the context of consumer ADR, vulnerable consumers, the impact of being complained about and fairness in complaint handling.

Jane was the lead researcher on the Office of Road and Rail report on first-tier complaint handling in regulated sectors. Jane also led the qualitative research and analysis for the Citizens Advice (2017) report on alternative dispute resolution. She is a member of the Chartered Trading Standards Institute and works with them as an examiner and moderator. She has extensive experience of running short courses for regulators, ombudsman organisations and complaint handlers working in both the public and private sector. Jane is a consumer representative on the Scottish Civil Justice Council and a member of their Access to Justice Committee.

Appendix Two - List of organisations with whom a member of the review team conducted an interview.

Community Groups:

All Aboard

Consumer Action Law Centre

Refuge of Hope

VALID

VCOSS

Industry Organisations:

Metro Trains

Public Transport Victoria

Rail Projects Victoria

TransDev

V/Line

Yarra Trams

PTO

Chairperson

One consumer representative and one industry member

Managerial and operational staff.

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