



Postal Industry Ombudsman Bill 2004

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Postal Industry Ombudsman Bill 2004

Date Introduced: 18 November 2004

House: Senate

Portfolio: Communication, Information Technology and the Arts

Commencement: The main provisions will commence on a day to be fixed by proclamation or six months after Royal Assent, whichever occurs first.

Purpose

The Postal Industry Ombudsman Bill 2004 (the Bill) aims at establishing an external dispute resolution scheme in the form of an Ombudsman regime for the postal industry.

Legislative history

The Bill was previously introduced on 12 August 2004. However, with the prorogation of the 40th Parliament, the Bill lapsed. The Government has reintroduced the Bill without major changes.¹

Key points of the Bill

These are the key points of the proposed legislation:

- The Bill will create the Postal Industry Ombudsman (PIO) as a separate office within the Commonwealth Ombudsman's office
- The PIO will have the power to investigate complaints against Australia Postal Corporation (Australia Post) and private postal operators (PPOs) that are registered
- The Commonwealth Ombudsman retains jurisdiction over Australia Post which will result in a dual complaint regime in relation to Australia Post
- With respect to Australia Post, investigations can be transferred from the office of the Commonwealth Ombudsman to the office of the PIO and vice versa
- The PIO's powers will not be as extensive as the powers of the Commonwealth Ombudsman, and
- The office of the PIO will be financed by fees charged to Australia Post and the registered PPOs in relation to investigations.

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Background

The office of the Ombudsman—a brief overview

Historically, the office of ‘Ombudsman’ as developed in Europe has served as a mechanism to increase the bureaucracy’s accountability to the people. The office’s role included:

- the investigation of complaints from the public against the bureaucracy
- the initiation of investigations of public administration on its own motion
- the recommendation or securing of redress where a complaint was found to be justified, and
- the recommendation of improvements to the administrative systems.²

The Ombudsman has been referred to as:

an official appointed to investigate complaints against public bodies, government departments or their servants or employees, who acts as an independent referee, without power of sanction or appeal, between individuals and their governments and its administration.³

In essence, the office of the Ombudsman provided an investigation and dispute resolution mechanism, giving people an independent platform to voice concerns about, and complaints against, the bureaucracy. It also had a mandate to pursue those concerns and complaints on the people’s behalf. However, in recent years the traditional office of the Ombudsman has been further evolved and diversified. Today, it is possible to distinguish between public sector and private sector Ombudsman offices. The modern public sector Ombudsman offices often reflect the traditional role and tasks of the Ombudsman office as described above, however, they can also encompass specialised Ombudsman offices or even some ‘in-house complaints mechanisms’ within departments.⁴ The private sector Ombudsman offices are an even later addition to the role of the Ombudsman and emerged only very recently in Australia. These private offices are often created as industry-based dispute resolution schemes, such as the Banking and Financial Services Ombudsman or the Insurance Ombudsman.⁵ They aim to ‘offer[...] protection for the consumer in the fields of commerce and industry.’⁶ Usually, the participation in such schemes is voluntary and they are financed by industry members.

Basis of policy commitment

In 2001, the Howard Government promised to introduce an Ombudsman office to oversee Australia’s postal industry. In its 2001 election policy *The Howard Government—Putting Australia’s Interests First*, the Government acknowledged that a dispute resolution scheme for the postal industry is necessary to ‘assist customers who have not been able to resolve disputes satisfactorily with postal operators’.⁷ More recently, this commitment was

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reiterated by the then Minister for Communications, Information Technology and the Arts, the Hon. Senator Richard Alston on 1 October 2003, foreshadowing that the ‘Government will deliver on a key election commitment by establishing a Postal Industry Ombudsman.’⁸ The Bill implements this policy commitment for the postal industry.

Position of other parties and significant interest groups

The Australian Labor Party announced in its 2004 election campaign that it would also introduce a Postal Industry Ombudsman. In a joint policy document, the Shadow Minister for Communications, the Hon. Lindsay Tanner MP, and the Parliamentary Secretary for Communications, Michelle O’Byrne, outlined the Labor Party’s plan for Australia’s postal industry, noting that ‘Labor will introduce a Postal Industry Ombudsman as a priority so that consumer can satisfactorily resolve disputes with postal companies.’⁹

The Commonwealth Ombudsman has welcomed the proposed establishment of a postal industry dispute resolution system. He noted that ‘the creation of a separate office of the Postal Industry Ombudsman is an important step in safeguarding consumer rights in the postal industry.’¹⁰ The Post Office Agents Association Limited has also signalled its full support for the introduction of the Postal Industry Ombudsman.¹¹

Main provisions

The Bill proposes amendments to the *Ombudsman Act 1976* (the Ombudsman Act) to confirm the Commonwealth Ombudsman’s jurisdiction over Australia Post and to create the office of the PIO with jurisdiction over Australia Post and registered PPOs.

Schedule 1, Part 1—Amendments to the Ombudsman Act 1976

Under **item 6** of the Bill, a PPO is defined as an entity which provides ‘postal or similar services’. Under **item 5**, ‘postal or similar services’ will be defined as ‘a postal service; and a courier service; and a packet or parcel carrying service’. These terms are not further defined or explained in the Bill or the Explanatory Memorandum.¹²

New Part IIB—Establishment, functions, powers and duties of the Postal Industry Ombudsman

Central to the Bill is **item 11** which adds a **new Part IIB** to the Ombudsman Act. It will establish the office of the PIO and set out the PIO’s functions, powers and duties.

Division 1—Preliminary

Proposed new Division 1 of new Part IIB will provide definitions for the terms ‘officer’ and ‘principal officer’ in relation to the Australia Post and the PPOs (**new section 19G**).

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Proposed **new section 19H** extends the application of the POI scheme to contractors having postal services contracts with Australia Post or a PPO. Under **new section 19J**, the scheme will, under certain circumstances, continue to apply to deregistered PPOs.

Division 2—Establishment and functions of the Postal Industry Ombudsman

New section 19L will establish the office of the PIO within the office of the Commonwealth Ombudsman. Subsection 19L(2) stipulates that the office of the PIO is to be held by the Commonwealth Ombudsman.

Postal Industry Ombudsman—Creation and Functions

New section 19M sets out the primary functions of the POI. Under new **subsection 19M(2)**, the POI may:

- investigate complaints initiated by consumers (**paragraph 19M(2)(a)**), or
- investigate on his/her own motion (**paragraph 19M(2)(b)**).

An investigation may be directed against Australia Post or a registered PPO, but is limited to actions taken with respect to the provision of a postal or similar service (**subsection 19M(3)**). The function will be further limited by virtue of **new subsection 19M(4)** according to which the PIO is unable:

- to investigate complaints made by Australia Post against a registered PPO or complaints made by a registered PPO against Australia Post or another registered PPO, and
- to pursue complaints which relate to actions taken more than twelve months prior to the making of the complaint.

A dual regime in relation to complaints against Australia Post

The Bill will save the Commonwealth Ombudsman's jurisdiction over Australia Post. As a result, Australia Post will be the subject of a dual regime and complaints against it may be investigated and resolved by either the office of the Commonwealth Ombudsman or that of the PIO. As both offices can receive complaints concerning Australia Post, **new subsection 19N** will allow both offices to decide which office should more appropriately deal with the complaint. If appropriate, the new scheme will also permit the recipient of a complaint to transfer the matter, or parts thereof, to the other office. In other words, where a complaint is made to the office of the PIO, **new subsections 19N(2) and (3)** will permit the PIO, before or after starting an investigation, to transfer the entire complaint, or parts thereof, to the office of the Commonwealth Ombudsman. The basis for such a referral will be the PIO's opinion that the complaint could be more appropriately dealt with by the other office. Where a complaint is made to the office of the Commonwealth Ombudsman, the entire complaint, or parts thereof, may be transferred to the office of the PIO if the Commonwealth Ombudsman decides that the matter can be dealt with more appropriately

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by this office. This transfer may occur before or after the Commonwealth Ombudsman commences investigating the complaint (**new subsection 19N(4) and (5)**). The Commonwealth Ombudsman will have to make a decision to transfer a matter within twelve months after the actions in issue were taken by Australia Post (**new paragraph 19N(5)(b)**).

In forming an opinion about which office can more appropriately deal with a complaint, the Commonwealth Ombudsman and the PIO ‘must have regard to the functions and duties of each of those offices’ (**new subsection 19N(8)**). To maintain sufficient transparency, the complainant must be informed about any transfer in writing (**new subsection 19N(9)**).

Since the Bill proposes that the same person will act as the Commonwealth Ombudsman and the PIO, in practice this person will have to decide whether a postal industry complaint against Australia Post requires the more intrusive powers of the Commonwealth Ombudsman or the less extensive PIO powers.

The involvement of other statutory office-holders

In certain circumstances, a complaint may be better dealt with by other statutory office-holders such as, for example, the Privacy Commissioner. Under **new section 19P**, the PIO will have the discretion to transfer complaints against Australia Post and PPOs where PIO is of the opinion that the matter could be dealt with more ‘conveniently or effectively’ by a particular statutory office-holder (**new paragraph 19P(1)**). The complainant must be informed of any such transfer (**new paragraph 19P(3)(a)**).

Discretion not to investigate a complaint

New section 19Q will confer upon the PIO a discretion not to investigate a complaint against Australia Post or a registered PPO if:

- the complaint is frivolous, vexatious or was made in bad faith (**new subparagraph 19Q(1)(b)(i)**)
- the complainant has insufficient interest in the matter (**new subparagraph 19Q(1)(b)(ii)**), or
- the circumstances do not warrant the investigation (**new subparagraph 19Q(1)(b)(iii)**).

Division 3—Powers and duties of the Postal Industry Ombudsman

New Division 3 will create the powers and duties of the PIO in two different ways: first, by devising a scheme which confers many of the Commonwealth Ombudsman’s powers upon the PIO, and second, by creating PIO specific powers and duties.

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Powers the Commonwealth and Postal Industries Ombudsman will have in common

New section 19R will operate by extending numerous powers conferred upon the Commonwealth Ombudsman to the PIO. **New subsection 19R(3)** lists those provisions in the Ombudsman Act that will become applicable to the PIO, including, for example, section 7 of the Ombudsman Act dealing with complaints, section 8 of the Ombudsman Act setting out the manner and process of conducting the investigations and section 9 of the Ombudsman Act which provides the powers to obtain information and documents. This new subsection will also set out those provisions in Ombudsman Act that will not be applicable to the PIO. For the details of this cross-referencing scheme, the reader is referred to the explanations set out in the Explanatory Memorandum to the Bill.¹³

New section 19S defines the purposes for which the PIO can exercise the powers to obtain information and documents, including, for example, for the purpose of *determining* whether or not to investigate an action, *deciding* whether or not to investigate an action or investigate an action further, or preparing a report in relation to an investigation.

Postal Industry Ombudsman duties

When exercising the office's powers, the PIO will be obliged to comply with the rules of procedural fairness (**new section 19T**).

New section 19V will require the PIO in certain circumstances to prepare reports for Australia Post or a registered PPO after having completed an investigation. A duty to report will only arise where the PIO identified an action, for example, as having been contrary to the law, unjust, unreasonable or discriminatory and the PIO is of the opinion that some countermeasure should be taken, including measures such as mitigating or rectifying actions, but also the introduction or change of policies (**new paragraph 19V(1)(c)**). Where the PIO is required to prepare such a report, the office-holder must ensure that the report will not reveal the complainant's identity (**new section 19U**). This duty will also apply in relation to any annual report prepared under **new section 19X**.

A report prepared by the PIO under new section 19V may, in certain circumstances, be tabled in parliament. Under **new section 19W**, the PIO will have the power to request the Minister administering the *Australian Postal Corporation Act 1989* to table the report where the PIO is of the opinion that appropriate and adequate actions, for example based on the recommendations made in the report, were not taken within a reasonable time. Further, where the PIO is of the opinion that there is evidence that an officer of Australia Post or a registered PPO has engaged in misconduct, the PIO will have the power to bring the evidence to the attention of the employers or, if the evidence concerns the principal officer of Australia Post, the Minister (**new paragraphs 19Y(2)(a) to (c)**).

New section 19Z will provide protection to a person who gives information, documents or records to the PIO, whether voluntarily or where required to do so (**new subsection 19Z(1)**). However, there are three significant limitations on the availability of this

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protection. First, the protection will only be available if the information is given in good faith, second, the information is given in relation to the PIO's functions and powers, and third, the protection will only be available in relation to the *giving* of information, documents or records, not in relation to any *conduct* of the person that may be revealed by the material or information given by the person.¹⁴

Division 4—Register of PPOs

New Division 4 will establish the framework for a register of PPOs. PPOs may apply in writing to be registered but are not obliged to do so (**new section 19ZA**). The framework will also cover the information that must be included with the registration (**new section 19ZB**) as well as deregistration of a PPO (**new section 19ZC**).

Division 5—Fees for registration

Under **new section 19ZE**, the PIO is entitled to charge Australia Post or a registered PPO a fee for a completed investigation (**new subsection 19ZE(1)**). The amount must be either the amount equivalent to the costs incurred by the PIO in conducting the investigation (**new subsection 19ZE(2)**) or may be determined by the Minister (**new subsection 19ZE(3)**). The fee is payable to the Australian Communication Authority (ACA) (**new subsection 19ZE(7)**).

Remaining proposed provisions, especially changes to the *Migration Act 1958*

Proposed schedule 1, Part 2—Amendments of other Acts contains proposed amendments to the *Migration Act 1958* and the *Privacy Act 1988*.

The amendment to the *Migration Act 1958* (the Migration Act) will remove the right of a detainee to receive a communication which the PIO has addressed to them (**Part 2, Item 15 and 16**). According to this provision, there will be no duty upon officers of the Department for Immigration and Multicultural and Indigenous Affairs to deliver mail from the PIO to a detainee, unless a complaint was made by the detainee to the PIO. The provision resembles provisions with the same effect in relation to communications sent by the Commonwealth Ombudsman (subsection 193(3)(b) of the Migration Act) and the Human Rights and Equal Opportunity Commissioner (subsection 193(3)(a) of the Migration Act). A detailed discussion in relation to the introduction of these similar provisions, including a discussion of the relationship between these provisions and Australia's obligations under, for example, the *International Covenant on Civil and Political Rights*, can be found in the [Bills Digest](#) to the Migration Legislation Amendment Bill (No. 2) 1996.¹⁵

Proposed schedule 1, Part 3 will regulate the application of Part 1 and provides some transitional provisions. **Proposed schedule 2** of the Bill will make further consequential amendments to the Ombudsman Act.

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Discussion of the provisions

The Bill proposes amendments to the Ombudsman Act to create a dual system: the office of the Commonwealth Ombudsman retains jurisdiction over Australia Post. In addition, there will be a new office of the PIO, also with jurisdiction over Australia Post and jurisdiction over registered PPOs. The offices are not separated but the offices of the PIO and of the Commonwealth Ombudsman are to be held by the same person. To this extent, the proposed scheme is similar to the scheme devised for the Defence Force Ombudsman. What is new is that the PIO will have jurisdiction over private sector entities and to this extent the regime closely resembles industry-based external dispute resolution mechanisms such as the Banking and Financial Services Ombudsman.

Specific issues in relation to the scheme generally

In relation to the new scheme generally, the following issues are worth noting:

- in relation to the Australia Post, the Commonwealth Ombudsman will have the power to refer complaints to the PIO and vice versa. Notably, there is no limitation on the number of times such referrals may occur. In theory, a complaint could be transferred between the offices several times, delaying any resolution of the complaint. Further, the Bill will not specify more detailed guidelines to make the transferral process more transparent. Parliament may wish to consider imposing a cap on the number of times a complaint may be referred to increase transparency and certainty for consumers.
- the statutory protection awarded under section 19Z of the Bill will only be available where the information, document or other record was provided to the PIO in 'good faith'. However, the way in which information, documents and records are provided is irrelevant to a complaint or investigation and may discourage people to assist, for example, in the investigation of systemic problems in the postal service. Parliament may wish to consider removing the reference to 'good faith' in this context, to afford a person the statutory protection regardless of the circumstances in which the information, document or record was provided, and
- the amendments will remove any duty upon officers of the Department for Immigration and Multicultural and Indigenous Affairs to deliver mail from the PIO to a detainee, unless a complaint was made by the detainee to the PIO. This removal may be in violation of Australia's obligations under, for example, the *International Covenant on Civil and Political Rights*. Parliament may wish to consider whether the proposed amendments to the *Migration Act 1958*, depriving immigration detainees of the right to receive communications from the PIO except where a specific complaint has been made, are necessary in the context of Australia's broader migration policies.

Specific issues in relation to the PIO

In relation to the PIO's jurisdiction over Australia Post, the following issues are worth noting:

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- the office of the PIO will exercise its jurisdiction over Australia Post together with the Commonwealth Ombudsman, however, there are some significant differences between the two offices' scope of jurisdictions, including, for example the PIO's lack of power to enter the premises of Australia Post or a PPO. The Explanatory Memorandum noted that the differences between the jurisdictions were chosen to 'avoid applying powers [to the PIO] which are not considered necessary and which may act as a deterrent to a postal operator registering with the PIO.'¹⁶

In relation to the PIO's jurisdiction over PPOs, the following issues are worth noting:

- the application of the regime is very broad. The scope of the terms 'postal service', 'courier service' and 'packet or parcel carrying services' are not further defined, but are likely to have a significant overlap. PPOs potentially able to join the scheme will include:
 - large mail service and courier companies such as the logistics company Toll Holdings Ltd or the mail service Deutsche Post Global Mail
 - medium sized, regional and small local service providers, such as local courier services, and
 - certain air freighters or some storage and transport businesses, with the latter two types of businesses covered to the extent that they are involved in private sector parcel delivery services.
- Similar to industry-based complaint or dispute resolution schemes such as the Banking and Financial Services Ombudsman, the proposed POI scheme is not compulsory for PPOs, but they can opt to participate in the scheme. However, the courier service market is characterised by a strong fragmentation with many very small companies and even individuals operating as courier businesses. Business Analyst Ibisworld Pty. Ltd. noted in its latest courier services industry research that:

The industry is dominated by small businesses with nearly 75 per cent of management unit locations employing less than 10 people.¹⁷

This market structure is considerably different from, for example, the banking sector where a highly successful, voluntary industry-based Ombudsman scheme operates. In a fragmented market such as the courier services market, it seems to be at least unclear just how many of the small companies may actually join the scheme, especially considering that they may be faced with bearing the costs for the PIO.

Is there a case for a compulsory PIO scheme?

Parliament may want to consider whether it is desirable to make the scheme compulsory for operators to join. Points in favour of a compulsory system could be:

- Increase of consumer-confidence in the industry

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A compulsory scheme would require anyone who is engaged, or wants to engage, in a business sector covered by the proposed legislation to become affiliated with the scheme. This could enhance consumer-confidence due to a higher level of regulation of the industry.

- Avoidance of false industry representations to consumers

Compulsory registration would prevent service providers making false representations to consumers about their affiliation with the scheme.

- Improvement of industry standards

A higher degree of business participation could assist the industry in improving its practices. Ombudsman schemes are known to detect systemic issues within the industry they apply to. The introduction of a compulsory scheme covering the entire postal industry would provide the most comprehensive basis to identify any systemic issues in the postal industry.

- Increased transparency and certainty for consumers

Under the proposed PIO scheme, industry participants may be able to choose the dispute resolution forum that is more beneficial to them: If they choose to:

- join the new PIO scheme as a registered PPO—the proposed PIO scheme will become applicable to them, or
- remain unregistered—any complaint against the service provider will have to be based on state consumer protection legislation and must be brought before the states' Offices of Fair Trading.

Considerations such as financial contributions to the Ombudsman scheme may be an important argument not to join the proposed PIO scheme as a registered PPO, especially for small businesses. A compulsory system could have the advantage that even small businesses were required to join the scheme. This would lead to a system that has the potential to be more transparent and certain for consumers because the need determine the jurisdiction applicable to the dispute would become obsolete.

Concluding comments

The introduction of an external complaint and investigation mechanism to oversee the Australian Postal Industry has been on the political agenda at least since 2001 and has been welcomed by interest groups. However, the scheme arguably lacks transparency and certainty for consumers. In addition, there is a possibility that many small businesses may choose not to participate in the scheme. Accordingly, whether the proposed scheme will be a success story will strongly depend on its acceptance amongst both those small businesses and the customers who bring complaints.

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Endnotes

- 1 The only change occurred with respect to proposed new section 19ZE. The Bill introduced in the 41st Parliament contains subsection (4) which provides that written determinations by the Minister in relation to fees to be charged for investigations conducted by the Postal Industry Ombudsman are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*.
- 2 R. Gregory and P. Giddings, 'The Ombudsman Institution: Growth and development', in R. Gregory and P. Giddings (eds), *Righting Wrongs: The Ombudsman in Six Continents*, IOS Press, Amsterdam, 2000, p. 5.
- 3 *ibid.*, p. 3.
- 4 For further examples see: *ibid.*, pp. 8–10.
- 5 C. Neave and J. Pinnock, 'Setting the scene Industry-based customer dispute resolution schemes', paper presented at 'ADR – A better way to do business,' National Alternative Dispute Resolution Advisory Council (NADRAC), Sydney, 2003, p. 4.
- 6 R. Gregory and P. Giddings, *op. cit.*, p. 10.
- 7 Australian Liberal Party, *The Howard Government—Putting Australia's Interests First, policy paper*, Melbourne, 2001, p. 7.
- 8 R. Alston, Minister for Communications, Information Technology and the Arts, *Stamping Down on Postal Industry Complaints*, [media release](#), no. 183/03, Canberra, 1 October 2001.
- 9 L. Tanner, Shadow Minister for Communications, and M O'Byrne, Parliamentary Secretary for Communications, Labor's Plan for Australia's Post, policy document, Canberra, 2004.
- 10 The CO, *New postal industry role for CO*, [media release](#), Canberra, 23 August 2004.
- 11 Post Office Agents Association Limited, *News, Meetings & Events, Post-election Update*, [media release](#), Melbourne, undated.
12. Explanatory Memorandum to the Postal Ombudsman Bill 2004, p. 1.
- 13 *ibid.*, pp. 12–22.
- 14 *ibid.*, p. 25
- 15 K. Magarey, 'Migration Legislation Amendment Bill (No. 2) 1996', *Bills Digest*, No. 111, Parliamentary Library, Canberra, 1995–1996.
- 16 *ibid.*, p. 1.
- 17 Ibisworld Australia Business Intelligence, J7112 - Courier Services in Australia, Industry Analysis Report, prepared 15 October 2004, p. 8.

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