

The Aviation Industry Ombuds Scheme – Response to consultation paper

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Design of the Aviation Industry Ombuds Scheme

1. What should be the objectives of the Aviation Industry Ombuds Scheme?

The objectives stated in Section 1.1 are supported. The objectives are sufficiently broad to allow most airline and airport related issues that directly affect customers to be investigated.

2. What powers and functions should the ombudsperson have?

The powers described in Section 1.2 are supported. Care will be required in the drafting of regulations and legislation empowering the ombudsperson. The creation of another 'paper tiger' due to unforeseen limitations in authority due to poor drafting would be deeply disappointing.

It is understood that the ombuds scheme is not an enforcement body, it will have a role in identifying conduct by airlines and airports that may warrant enforcement action by the appropriate regulator. For the ombuds scheme to provide effective service to customers the 'appropriate regulators' must also be sufficiently empowered—and motivated.

Industries have a record of capturing their regulators. Regulator capture was among the issues reported by Shergold and Weir (2018)¹ in their investigation of the building industry. If any of the aviation industry regulators have been captured the ombuds scheme will fall well short of public expectation.

3. What governance arrangement should be adopted for the Aviation Industry Ombuds Scheme?

A governing board for the Aviation Industry Ombuds Scheme is supported. This is standard practice and has proven a successful model in most instances.

A question that the public will ask is 'Who will appoint—or remove—the board members?' This will need to be very clearly explained and justified.

4. If a board is established to govern the Aviation Industry Ombuds Scheme, what powers and functions should the board have?

While some board members will no doubt be appointed as industry and consumer representatives, an independent chair is essential. Equally, additional independent board members should be appointed. The Aviation Industry Ombuds Scheme has been proposed as a remedy to aviation industry poor practice and any perception that industry had a significant presence on the board would be poorly received by the public.

¹ Peter Shergold and Bronwyn Weir 2018 Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia
https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf

The Aviation Industry Ombuds Scheme board should have the power to appoint key officeholders, including the relevant ombudsperson. They should also have responsibility for corporate governance, including the setting of budgets and membership fees. As per other boards, the Aviation Industry Ombuds Scheme board should not have a day-to-day role in managing the scheme.

5. Is it appropriate to appoint two individual ombudspersons within the scheme – one with responsibility for aviation consumer issues, and the other with responsibility for aircraft noise?

It would be appropriate to appoint two individual ombudspersons. Aviation consumer issues and aircraft noise issues are very separate matters and would benefit from having a subject matter expert sitting in each role. Few individuals would be expert in both fields. Two individual ombudspersons would therefore be optimal.

6. Which airlines and airports should be required to be members of the Aviation Industry Ombuds Scheme? Should there be any exemptions and, if so, on what grounds?

All airlines and airports operating a public transport service in Australia should be members of the Aviation Industry Ombuds Scheme. This would apply to international carriers to the extent possible. Whatever additional policy considerations might be required to fully incorporate international carriers should be undertaken expeditiously.

Exemptions from the Aviation Industry Ombuds Scheme should not be permitted. Exemptions would limit the reach of the ombudsperson's powers under the proposed aviation-specific disability standards, among other issues.

7. Should the government adopt a phased approach to the application of the Aviation Industry Ombuds Scheme to different categories of airlines and airports?

Considering public impatience with the aviation industry, any implementation delays would be poorly regarded. While there may be some merit in allowing a phased entry into the Aviation Industry Ombuds Scheme for airports in rural and remote areas this would require clear explanation and justification. The better approach from the public's perspective is for all of industry to enter on a single date.

8. How should funding arrangements for the Aviation Industry Ombuds Scheme operate?

The proposal that the costs of operating the Aviation Industry Ombuds Scheme will be met by the aviation industry is supported. The rationale that funding from industry will:

- support the sustainability and independence of the scheme,
- allow for an equitable distribution of costs to those industry participants that generate the costs, and

- incentivise scheme members to resolve complaints directly with customers to reduce the cost of administering the scheme,

is a reasonable premise. .

Combinations of the dot points below seem fair:

- annual membership fees,
- charges based on business size (measured either by revenue or customer volume),
- charges based on complaints volume and complaint escalation rates.

It is reasonable that poorly performing members will incur greater costs than those that perform well from the public's perspective.

9. What features of existing industry ombuds schemes, and similar bodies, in Australia and overseas, should be considered in the design of the Aviation Industry Ombuds Scheme?

The features listed below are supported in principle. Of concern would be the proportion of the board drawn from industry. Industry has a place on the board but bearing in mind the past suboptimal performance of industry, and their robust defence of that performance, the public would be wary of a board with a strong industry representation.

The following are supported:

- A governing board, responsible for determining the business affairs, goals, budgets and overall strategy of the scheme.
- Board appointment of the ombudsperson and other key office holders
- An independent ombudsperson
- Costs recovered from scheme members.

Complaint handling

It may also be appropriate to impose other limits on complaint eligibility, for example in relation to complaints made after a certain period of time has elapsed, frivolous or vexatious complaints, complaints that are the subject of ongoing legal proceedings, and/or anonymous complaints.

10. What types of complaints should be eligible for consideration by the Aviation Industry Ombuds Scheme, and what types of complaints should not?

It is noted that the government will consult separately in the future on complaint eligibility in relation to the ombuds scheme's proposed disability access functions. Bearing in mind the frequency and scope of discriminatory incidents and practices endured by people with disability this will be a very important consultation.

The proposal that the Aviation Industry Ombuds Scheme be authorised to consider complaints in relation to any matters set out in the Aviation

Customer Rights Charter is supported. It is also supported that the ombuds scheme is able to receive complaints in relation to:

- other matters addressed by the Australian Consumer Law,
- matters included in airlines' and airports' contracts with their customers,
- lost and damaged baggage, consistent with airlines' obligations under the Civil Aviation (Carriers' Liability) Act 1959.

11. Should the Aviation Industry Ombuds Scheme be able to accept complaints relating to breaches of privacy by members of the scheme?

The proposal that the Aviation Industry Ombuds Scheme should become the external dispute resolution scheme for breaches of privacy by scheme members, subject to approval of the Office of the Australian Information Commissioner under section 35A of the Privacy Act 1988, is supported.

12. How should the Aviation Industry Ombuds Scheme handle complaints about airlines and airports in relation to services purchased through a travel agent or other third party?

If complaints about airlines and airports in relation to services purchased through travel agents or other third parties are received by the Aviation Industry Ombuds Scheme, these should be referred to existing complaint resolution bodies. If no appropriate body exists then it should be created.

13. What existing complaints schemes or processes have the potential to overlap with the Aviation Industry Ombuds Scheme?

It is noted that the government will consider how to manage the potential overlap in remits between the ombuds scheme and the Australian Human Rights Commission through future consultation on the ombuds scheme's role in relation to disability access. It is recommended that this is a co-designed process with significant disability sector representation.

State and Territory human rights and anti-discrimination commissions would also receive complaints from members of the public who had been refused a service or offered a service under discriminatory circumstances. The Aviation Industry Ombuds Scheme will need to work with these jurisdictions.

14. Who should be eligible to make complaints to the Aviation Industry Ombuds Scheme?

In addition to consumers (as defined in the Australian Consumer Law), consumers' advocates should also be eligible to lodge complaints on behalf of consumers. Many consumers will not be competent to self-advocate and will rely on an advocate to assist and guide them. The Australian Human Rights Commission permits advocates to lodge

complaints on behalf of others² and the Aviation Industry Ombuds Scheme should follow this example.

The proposal that small businesses and Not-for-Profits should be eligible to lodge complaints to the ombuds scheme is supported.

15. If small business and not for profit (NFP) organisations are eligible to make complaints, in addition to consumers, what criteria should be applied to define eligible small businesses and NFPs?

Existing definition should apply in order to avoid ambiguity and confusion.

The Australian Tax Office definitions of Not-for-Profit Organisations should be considered for adoption³.

The Fair Work Commission⁴ states that 'The law says you are a small business if you employ fewer than 15 people. This is the total number of individuals, not the full-time equivalent number.'

16. What complaint resolution process should the Aviation Industry Ombuds Scheme adopt?

The proposed three stage process for complaint resolution by the Aviation Industry Ombuds Scheme is supported:

1. attempt to resolve the complaint directly between the business and customer,
2. referral of the complaint to the ombuds scheme,
3. case management and binding decision by the ombudsperson.

This process is well understood and permits reasonable outcomes in most instances.

17. How much time should an airline or airport have to resolve a complaint, before the complaint is considered by the Aviation Industry Ombuds Scheme? What factors should be considered by the Ombudsperson when deciding if a complaint was resolved within a reasonable time?

The aviation industry and the public may have quite different views on what constitutes 'a reasonable time to resolve the complaint'.

It is accepted that the amount of time that is considered reasonable could depend on the complexity of the complaint and the level of information provided by the complainant to support resolution of the complaint.

² AHRC complaint form

https://humanrights.gov.au/sites/default/files/20210903_ahrc_complaint_form_0.pdf

³ Types of NFP organisations

<https://www.ato.gov.au/aboriginal-and-torres-strait-islander-peoples/not-for-profit-organisations/types-of-nfp-organisations>

⁴ What is a 'small business'?

<https://www.fwc.gov.au/issues-we-help/small-business-hub/what-small-business>

Cases will vary widely in hardship though, with some requiring little more than an apology while others may result in significant financial hardship. For example, a cancelled flight on July 10, 2024, left a family stranded in Japan for seven days⁵. This added \$7,000.00 to their travel expenses. As of August 28, 2024, no compensation was forthcoming. With the added financial pressure of the cancellation and delay in rescheduling a return flight this is clearly not 'a reasonable time to resolve the complaint'.

The Aviation Industry Ombuds Scheme is entitled to use discretion on what is 'a reasonable time to resolve the complaint', but it should clearly explain its determination of 'reasonable' to complainants.

18. What time limit should apply for making a complaint?

Time limits imposed by Australian Consumer Law should apply. These should be adopted but should not limit the ombudsperson's discretion.

19. What should be the maximum monetary amount the ombudsperson is able to award?

Pecuniary penalties are detailed in Australian Consumer Law. These should be adopted but should not limit the ombudsperson's discretion.

Guidance and reporting

20. What regular publications should the Aviation Industry Ombuds Scheme produce?

The publication of guidance and reports listed in the Aviation White Paper is supported and welcome. Any publicly available material should be available to the public in whatever medium or format that is accessible to them.

Article 21, *Freedom of expression and opinion, and access to information* of the United Nations' Convention on the Rights of Persons with Disabilities and Optional Protocol⁶ (CRPD) should at all times be adhered to:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

- (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies

⁵ Jetstar denied family travel compensation because receipts were in Japanese <https://www.abc.net.au/news/2024-08-28/jetstar-denies-reimbursement-for-cancelled-flights/104271320>

⁶ United Nations' Convention on the Rights of Persons with Disabilities and Optional Protocol <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>

appropriate to different kinds of disabilities in a timely manner and without additional cost;

- (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
- (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- (e) Recognizing and promoting the use of sign languages.

Australia signed the CRPD on 30 March 2007, ratified the CRPD on July 17 2008 and ratified the Optional Protocol on 30 July 2009⁷. These ratifications are quite significant as is stated on the Federal Attorney General's website commentary on Article 33 of the CRPD⁸:

In Australia, the Convention on the Rights of Persons with Disabilities (CRPD) is incorporated through legislation, policy and programs at federal, and state and territory levels. Implementation of the CRPD is a whole of government responsibility; this means that agencies at federal, state and territory levels play a part in implementing the articles of the CRPD within their portfolios.

Article 33, *National implementation and monitoring*, should be of direct concern to the ombuds scheme.

Publications of the type listed in the ombuds scheme consultation paper are supported:

- annual reports
- reports containing data and analysis about complaint volumes, complaint escalation and resolution rates, and complaint processing times

⁷ Disability and Carers

<https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/government-international/international-participation-in-disability-issues#:~:text=UN%20Convention%20on%20the%20Rights%20of%20Persons%20with%20Disabilities&text=On%2030%20March%202007%2C%20Australia,CRPD%20and%20the%20Optional%20Protocol>

⁸ Australian Government Implementation of Article 33 of the CRPD

<https://www.ag.gov.au/rights-and-protections/publications/australian-government-implementation-article-33-crpd>

- analysis of statistics and trends in the aviation industry
- guidance materials.

To this list should be added material on the proposed aviation-specific disability standards . People with disabilities should know their rights, and this information should be available in multiple accessible formats, including Auslan, plain English and simple English, as per Article 21 of the CRPD.

21. What processes should the Aviation Industry Ombuds Scheme adopt to provide procedural fairness to scheme members before it publishes certain data and information?

It is appropriate that the Aviation Industry Ombuds Scheme provide a reasonable opportunity for airlines and airports to respond to any information that might adversely affect them, before the information is published. The duration of 'reasonable opportunity' should be at the discretion of the ombudsperson, but should require a timely response from industry.

As noted in the consultation paper, procedural fairness requirements that would significantly affect the ability of the ombuds scheme to perform its functions would make the ombuds scheme untenable and could not be supported.

Show cause arrangement

22. What specific powers should the Aviation Industry Ombuds Scheme have to require airlines to provide information about delays and cancellations?

The 'show cause' arrangements detailed in the Aviation White Paper Initiative 3 are supported.

Adopt a 'show cause' arrangement, requiring airlines to report the reasons for delays and cancellations as part of the airlines' regular reporting of flight data to the Bureau of Infrastructure and Transport Research Economics (BITRE). The ombudsperson will also have powers to request additional information from airlines in relation to specific flights. Regular reporting of additional data about industry performance and conduct will increase transparency and public accountability for on-time performance, and support the government to identify if further regulatory action is required.

Where appropriate, the ombudsperson will also have the power to audit reasons for delays and cancellations, and to request additional information from airlines about specific delays or cancellations that are subject to a customer complaint to the ombuds scheme.

The Aviation Industry Ombuds Scheme will need to access more detailed information about the reasons for flight delays and cancellations than is reported to the Bureau of Infrastructure and Transport Research

Economics (BITRE). This power of the ombudsperson should be set out in enabling legislation and instruments.

Scheme compliance

23. What enforcement arrangements are appropriate to achieve compliance with the Aviation Industry Ombuds Scheme?

The enforcement arrangements detailed in the Consultation paper, and to be included in the legislation establishing the Aviation Industry Ombuds Scheme are supported:

- airlines and airports to become members of the ombuds scheme (unless exempt),
- scheme members to comply with directions from the ombudsperson to provide data and information to the scheme,
- scheme members to provide remedies to customers, following a final decision by the ombudsperson about a customer complaint,
- scheme members to make payments to fund the operations of the scheme.

Also supported is the proposal that a government entity would be responsible for taking enforcement action where an airline or airport fails to comply with a requirement of legislation.

It is appropriate that the legislation prescribes civil offences for non-compliance with the scheme, and includes options for the department to issue infringement notices or take court action.