



Department of
Communications
Information Technology
and the Arts

Issues Paper

Proposal to Establish a Postal Industry Ombudsman

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Table of Contents

1	INTRODUCTION.....	1
1.1	General Purpose	1
1.2	PIO Proposal	1
1.3	The Current Environment.....	2
2	PROPOSED PIO STRUCTURE.....	2
3	PROPOSED FUNCTIONS	3
4	PROPOSED JURISDICTION	3
5	PROPOSED PROCESSES AND POWERS.....	5
5.1	Proposed Complaint Determination Powers.....	5
5.2	Alternatives to Determinative Power	5
6	POSSIBLE FUNDING OPTIONS.....	6
7	IDENTIFICATION OF POSTAL OPERATORS.....	7
8	ALTERNATIVES.....	7
8.1	Industry Self-regulation.....	7
8.2	Establish the PIO in the Commonwealth Ombudsman’s Office	8
8.3	Australia Post Ombudsman	9
8.4	PIO Located in Another Commonwealth Regulatory Agency	10
9	SUBMISSIONS	11

1 INTRODUCTION

1.1 General Purpose

The main purpose of this discussion paper is to introduce, for the purposes of public discussion, a commitment contained in the 2001 Election policy document, *Delivering for the Future*, to establish a Postal Industry Ombudsman (PIO), based on the existing Telecommunications Industry Ombudsman (TIO) scheme. This discussion paper details how this commitment could be implemented.

The paper also outlines possible alternative strategies for establishing a customer rights protection body for the postal industry (with certain comparable but not necessarily identical functions to the TIO), or other arrangements for improving customer protection. None of the proposals detailed in this paper are intended to represent a final or a preferred Commonwealth position on implementing the Election commitment. Comment is invited from the community on all matters addressed in this document, plus alternatives to any of the suggested bodies or actions.

1.2 PIO Proposal

The election commitment for the establishment of the PIO states that it will operate in a similar fashion to the TIO in assisting customers who have not been able to resolve disputes satisfactorily with postal operators. The PIO is to be industry funded, and will also be responsible for reporting on service standards and developing codes of practice in relation to dispute resolution and complaints handling mechanisms.

In accordance with the election commitment, it is envisaged that the PIO might offer an impartial, independent one-stop process for handling the complaints of customers that could not be satisfactorily resolved by a postal operator's internal complaint management system. It would also:

- cover all providers of postal and like services (not just Australia Post);
- make decisions and issue findings, about investigations into matters concerning the delivery of letters and other postal articles, with the ability to award compensation up to a prescribed limit;
- be accessible to customers without charge; and
- be established and funded by industry, with funding based on type and numbers of complaints handled.

Presently, the only options available to a customer dissatisfied with the results of a complaint to a postal operator is to refer the complaint to one of the following bodies:

- (in the case of Australia Post) – the Commonwealth Ombudsman;
- (in the case of private delivery services) – State/Territory Offices of Fair Trading;
- (where formed) - complaints bodies established by industry associations; and
- (in serious cases [eg contract breaches]) - a court of competent jurisdiction.

While the establishment of the PIO is not intended to extinguish the jurisdictions of the bodies listed above, the PIO might be expected to receive referrals of customer service complaints about postal operators from such bodies. In turn, the PIO might be expected to refer any matters falling outside its jurisdiction to bodies such as the Commonwealth Ombudsman, the Australian Competition and Consumer Commission (ACCC), or State/Territory fair trading agencies.

1.3 The Current Environment

Under the *Australian Postal Corporation Act 1989*, Australia Post determines the terms and conditions under which it provides postal services, subject to its statutory powers and functions. It has developed a sophisticated in-house complaint procedure to monitor complaints and to identify potential systemic problems.

The Commonwealth Ombudsman can investigate complaints about actions and decisions of Australia Post to see if they are wrong, unjust, unlawful, discriminatory or simply unfair. The Ombudsman can also seek remedies for those affected by defective administration. Where a Government agency rejects a recommendation(s) by the Ombudsman, the Ombudsman has the power to notify the Prime Minister and Parliament on such matters.

While the Minister also receives complaints about Australia Post, the Minister has no direct powers to intervene in or resolve disputes.

There are no nation-wide controls over private businesses offering postal services. If an individual has a complaint about a private postal operator, the complaint can be referred to a State or Territory fair trading agency.

In a competitive environment, the level of customer satisfaction generally controls the quality of the service provided (ie a business must offer good service to retain and attract customers and stay in business). Some companies and industry associations have also put codes of practice and/or complaint management processes in place.

The Department is seeking comment on the following matters:

- How might the postal industry be defined?
- What sort of issues might be addressed by the PIO?
- Are there other complaint-management options that could be used?

2 PROPOSED PIO STRUCTURE

As stated previously, the election commitment provides for the establishment of a PIO along the lines of the TIO. The following chapters outline the possible structure, functions, jurisdiction and powers of the PIO if it is to be modelled on the TIO. Chapter 8 outlines alternatives to the PIO/TIO model.

Developing a corporate structure comparable to the TIO requires:

- the establishment of a private company under the *Corporations Act 2001*, for example the Postal Industry Ombudsman Ltd (PIO Ltd);
- appointment of a Board primarily comprising PIO Ltd members to control PIO Ltd, and to manage financial matters and corporate governance. The Board will also be responsible for appointing an Ombudsman to manage the PIO; and
- creation of a Council comprising representatives of PIO Ltd and consumer groups and chaired by an independent person (ie a person not aligned with either postal operators or consumer groups), to provide strategic advice on policy and related issues, and advise the Board on the appointment of an Ombudsman.

The dual Board/Council structure is intended to preserve the independence of the PIO from undue influence by PIO Ltd members, and encourage development of policies to improve service standards. Foundation members and the Board and Council will need to develop a constitution and related documents to comply with the Corporations Act, and establish in full the PIO's functions, jurisdiction, powers, funding arrangements and entry procedures. An outline of likely PIO members is provided in Chapter 4.

The Department is seeking comment on the following matters:

- Could the proposed structure enable the PIO to maintain its independence, and operate efficiently? Are there any structural issues? Are there other options?
- Does the PIO need both a Council and a Board to oversight its operations?
- How might members of the Council and Board be appointed?

3 PROPOSED FUNCTIONS

The types of functions that might be adopted by the PIO include to:

- assist customers unable to resolve disputes about the handling of postal articles and the quality of service with postal operators in a satisfactory manner;
- develop codes of practice to deal with customer complaints;
- report on service standards of postal operators;
- identify businesses that might need to join the PIO because they are providing postal products or services;
- assist postal operators to manage complaints more effectively, and offer an external point of reference for the most difficult issues raised;
- make consistent, binding national decisions about complaints, and offer guidance to other businesses that might face similar types of complaints; and
- decide that a postal operator pay compensation to a customer for losses incurred as a result of poor service (with prescribed maximum amounts).

The Department is seeking comment on the following matters:

- Do these functions adequately address all of the possible roles for the PIO? Are there any other functions that the PIO might undertake?
- Should some of the proposed functions not be performed by the PIO?
- Are there any issues arising from implementing any of the proposed functions?
- Are there any functions that should be covered by the jurisdiction of the PIO but potentially fall outside the PIO's jurisdiction as outlined below?
- Should the scheme be restricted to particular customers (eg exclude business customers)?
- Should the PIO prescribe service standards?

4 PROPOSED JURISDICTION

It is suggested the PIO deal with complaints about postal operators such as Australia Post, courier companies, direct mail agents, document exchange operators, mail aggregators and related businesses on the following matters:

- handling (including receipt, transportation and delivery) of directed mail articles (eg enclosed articles with a clear name and address on the front, with a maximum weight of [2 or 20] kg). Two kilograms represents the maximum weight the Universal Postal Union has established for a postal article to be considered a

letter. Twenty kilograms is the maximum weight of a single postal article normally transported by Australia Post; and

- quality of service issues concerned with the handling of postal articles.

If a complaint is lodged concerning the actions or conduct of an employee or contractor (eg agent, owner-driver) to a postal operator, the employer and/or principal is responsible for complaints before the PIO, in line with existing legal principles. It is not intended that individual employees or contractors be required to join the PIO, unless such persons are providing postal services in their own name, rather than just as an employee or contractor.

It is not intended that the PIO consider complaints or disputes:

- concerning policy decisions by Government;
- that are more than 12 months old. However, the PIO could be given discretion to extend the time limit a further 12 months in certain cases (in line with the TIO and other ombudsman schemes);
- between a company and its employees, agents or contractors;
- about the delivery of community newspapers, unaddressed and partly addressed advertising, or telephone directories;
- about tendering process and/or other contracting issues;
- pricing of services;
- concerning commercial decisions about the location of postal services, the location and/or number of post boxes, the method of provision of services, or sale of products and services;
- about the sale or delivery of non-postal articles (eg unstamped envelopes, writing paper, groceries) or provision of non-postal goods or services by businesses that also provide postal services;
- about the delivery of goods by businesses whose core business is not the delivery of goods (eg home deliveries from supermarkets or other retail outlets);
- about non-delivery or damage to postal articles arising from detention and inspection of articles by or on behalf of Government agencies listed under Part 7B of the *Australian Postal Corporation Act 1989* (eg customs);
- between PIO members;
- concerning provision of internal corporate or government mail services, except where the business is providing postal services accessible to the community;
- that are the subject of court action or investigation by another competent tribunal;
- involving anti-competitive behaviour and/or restrictive trade practices; or
- concerning the content of letters and articles (such matters can be addressed through appropriate Commonwealth or State/Territory legislation).

In order to gain a full understanding of the suggested jurisdiction, readers should examine both the proposed inclusions and exclusions. Any legislation prepared is intended to address both the proposed inclusions and exclusions from the PIO.

The Department is seeking comment on the following matters:

- Who should be covered by the PIO?
- What matters should the PIO investigate/not investigate?
- Should a 2kg or 20kg threshold be established? If neither, what weight or size threshold could be introduced?
- Are there any other exemptions that should be provided?

5 PROPOSED PROCESSES AND POWERS

5.1 Proposed Complaint Determination Powers

Using the TIO model as an example, the PIO could be given the option not to investigate a matter (eg if a complaint is considered frivolous or vexatious). Where it investigates, its powers could include rejecting a complaint, making a decision against a member, providing a finding of fact, or require the postal operator to pay compensation. The PIO could also have power to order a business to take remedial action, or to desist from an action.

It is further suggested that the PIO should provide its decisions in writing and state reasons why a decision is made. Under such arrangements, a complainant would have a specific period (eg 21 days) to accept or reject the decision. There would be no right of appeal for the PIO member within the PIO. If the PIO's decision was accepted, the complainant and the member would be bound by the decision. If dissatisfied, the complainant would have a period (eg 14 days) to seek a review of the finding. If a matter could not be resolved, the PIO could advise the complainant and close the file. Such an action would release both parties from any obligations imposed by the PIO. Where a member defies a determination, the PIO could apply for relief on behalf of a complainant to a court of competent jurisdiction.

5.2 Alternatives to Determinative Power

The two main alternatives to providing the PIO with determinative powers similar to those of the TIO are to provide the PIO with either recommendatory power or coercive/sanctions power.

With recommendatory power, the PIO could investigate and recommend that a member take remedial action on a complaint, but the member could not be compelled to implement the recommendation(s) or be penalised for not doing so. The Commonwealth Ombudsman and Canada Post Ombudsman apply recommendatory powers in their decision-making processes. There is a risk that limiting the PIO's powers in this way might encourage some members to ignore its recommendations, and thus reduce the PIO's credibility.

With coercive/sanctions power, the PIO could order actions be taken in its own name, and apply sanctions to members that don't comply with its decisions. These could include monetary penalties and/or suspension or cancellation of membership. The key risks include:

- the holding of such powers could be considered contrary to the role of an industry ombudsman. Members subject to complaints might attempt to defend themselves rather than work with the complainant and the PIO to seek solutions;
- such powers need to be clearly specified. Such specification of powers could mean the PIO loses some of its flexibility in addressing matters;

- members might be denied natural justice if powers are capriciously applied; and
- the application of powers might be challenged in a court, especially if the powers could be considered judicial in nature, potentially breaching Chapter III of the Constitution, or if natural justice is denied to one of the parties in any matter.

In addition, such powers are considered contrary to Government policy on industry ombudsman schemes.

The Department is seeking comment on the following matters:

- What processes/powers are needed by the PIO to fulfil the proposed functions in Chapter 3?
- If the TIO model is adopted, what implementation issues need to be considered?
- Are there other complaints management models that might be more effective than the TIO model?
- Does the PIO need recommendatory or coercive/sanctions powers? What are the costs, risks and benefits of such powers?

6 POSSIBLE FUNDING OPTIONS

The current TIO mechanism for the determination of fees and charges comprises:

- a fee charged for each matter that is heard by the TIO. The higher the level a complaint is categorised, the higher the fee incurred per matter; and
- a contribution to overheads fee, which is determined by the total number or percentage of disputes generated by the business and heard by the TIO.

The introduction of such a fee structure for the PIO potentially offers postal operators an incentive to minimise the number of matters raised, in order to minimise payments. Issues arising from implementation of this mechanism could include:

- the need to set the quantum of fees to reflect the costs of both investigations and operating the PIO, while not creating excessive costs or barriers to entry to the postal industry, especially for smaller postal operators. There are risks that:
- if fees are too low, they might not raise sufficient income to support the PIO's operations; or
- if fees are too high, some smaller operators might exit the industry; if a minority of members provide most of the funding, some consumer groups might claim these members have the capacity, using their resources, to capture the PIO's decision-making processes. This could damage the PIO's credibility.

A separate but related issue concerns ensuring as far as possible that PIO members keep fees payments up to date. One option to ease this problem would be for fees to be estimated quarterly in advance, based on the number of complaints received in the past quarter and the predicted number of complaints in the upcoming quarter. At the end of the year, account reconciliations could be completed, and either a refund issued or an additional invoice sent to the member. This action is intended to reduce the risk of the PIO incurring bad debts.

Alternative funding options that might involve all PIO members (not just members that have complaints referred to the PIO) contributing financially to the PIO include:

- a flat annual fee (either single rate or tiered);
- an annual fee on a sliding scale (based on volume of business or profitability); or
- a combined annual fee and dispute settlement fee. This option requires all businesses to pay something towards the PIO, but still provide incentive for businesses to manage their complaints effectively, to minimise such payments.

The Department is seeking comment on the following matters:

- Is it appropriate for all postal operators to be contributing financially to the PIO?
- Is it appropriate for the PIO to be given power to charge members in advance for expected complaints?
- Are there any other funding mechanisms that might need to be considered?

7 IDENTIFICATION OF POSTAL OPERATORS

Identification of postal operators has been raised as an issue for the PIO. Options that might assist the PIO to identify those companies falling under its jurisdiction include:

- introducing either a formal licensing system or accreditation process for existing postal service providers and businesses seeking to enter the postal industry;
- compulsory registration of postal service providers;
- establishing a voluntary registration scheme where postal operators "opt in" and make a public commitment to support the PIO and adhere to its decisions;
- identifying which services or what types of operators may be covered by the PIO.

The Department is seeking comment on the following matters:

- Is there a need for licensing, accreditation or registration to support the PIO? Would any of these schemes be likely to create barriers to entry (either formal or informal) for new operators?
- What are the likely costs and benefits of such processes?
- Are there other options that might assist the PIO to identify industry participants?

8 ALTERNATIVES

The listed alternatives propose different mechanisms and regulatory structures that could address a number of the issues identified in *Delivering for the Future*, but use solutions that differ from the TIO model.

8.1 Industry Self-regulation

Postal operators could (or might be requested by the Commonwealth to) establish their own arrangements to ensure service standards and/or control industry conduct. Self-regulation could involve only private operators (eg courier companies, direct mail agents, private distributors, etc) or Australia Post and private operators jointly establishing controls and institutions.

The competitive nature of some parts of the postal industry (eg courier services in major cities), has created a situation where those participants must provide good service to customers, or be forced to leave the industry. As a consequence, businesses in these areas may be conducive to self-regulation, as these businesses have a good commercial rationale in differentiating themselves through best practice in customer service.

Under a self-regulated environment, postal operators themselves decide whether any customer service issues exist in the industry, and what action should be taken to address these issues. Solutions might include forming:

- A formal industry-based dispute resolution scheme established on a voluntary basis, for example, a scheme similar to the Australian Banking Industry Ombudsman;
- a combination of a code of practice or some other document setting service standards and either an enforcement process or some other form of complaint management process (eg the Australian Direct Marketing Authority's Code of Practice, Code Authority and enforcement procedure); or
- code(s) of practice that operators will consent to following when addressing customer complaints.

The effectiveness of self-regulation can depend in part on the level of participation in any process or industry code adopted by the industry, and the willingness of those participants committed to that process to comply with that process or code. Where universal support is unlikely to be achieved, some industry members might look to self-regulation as a means of differentiating themselves from competitors that have not committed to participating in the self-regulation process.

The main issues with this option include:

- it could be argued that the conditions for establishing do not presently exist in the postal industry where the market is fragmented between the various types of postal services, and there is no one industry association;
- the Government would have no role in directing what type of process is established by industry for self-regulation;
- the self-regulation process might be weakened if a large business or group of large businesses decline to participate; and
- in the event of a significant decline in service standards, the Government might be required to impose regulations.

8.2 Establish the PIO in the Commonwealth Ombudsman's Office

The Commonwealth Ombudsman could be given legislative power to hear complaints about private postal operators. Presently, it can investigate any matter concerning Australia Post. The PIO could be established either:

- as a specialist branch of the Ombudsman's Office, with complaints allocated to identified officers; or
- as an additional function of the Ombudsman, with a senior officer given overall responsibility for postal matters, but with any employee of the Ombudsman being assigned complaints.

Subject to any legislative constraints, the Ombudsman might adopt some or all the functions outlined in Chapter 3 and jurisdiction outlined in Chapter 4 (with respect to private postal operators). It might also be appropriate for the Ombudsman to have access to determinative and compensation powers outlined in Chapter 5, in order to compensate complainants for loss. Additional legislation might be necessary to ensure the Ombudsman has sufficient powers to act as a PIO.

The main advantage of using the Commonwealth Ombudsman as PIO is that it has a long-established reputation for providing independent advice on customer complaints, potentially offering confidence to both complainants and consumer groups, and can be easily accessed in all parts of Australia. In addition, a new body is not needed.

The main issues with this option include:

- given that the PIO is intended to cover Australia Post and private postal operators, some operators and consumer groups might argue for the establishment of a body that is separate from both Government and the postal industry and dedicated exclusively to addressing customer service complaints about postal operators;
- the Ombudsman's workload might increase significantly, depending on the number of businesses that are required to participate in the PIO process; and
- the Commonwealth may incur additional costs if extra resources are required. Some of the cost could be offset through levies on postal operators (eg using one of the options outlined in Chapter 6). However, any plan to allow the Ombudsman to charge fees, even on one group, could have political implications.

8.3 Australia Post Ombudsman

An Australia Post Ombudsman could be formed to hear complaints from customers unhappy about decisions by Australia Post's internal complaint system, but operating externally from that system (eg having a separate complaint notification procedure, operating out of separate offices, etc). It could operate like the Canada Post Ombudsman, which was formed to hear complaints from customers not satisfied with the response to complaints made to Canada Post. However, the Australia Post Ombudsman could not be used as the first point of complaint against Australia Post.

An Australia Post Ombudsman could undertake most of the functions outlined in Chapter 3, other than identifying other postal operators or reporting on service standards, and Chapter 4 (with respect to Australia Post). It is suggested the Australia Post Ombudsman should not investigate complaints about commercial decisions, or direct Australia Post to take certain actions or pay compensation, but focus on reviewing customer complaints and recommending action to Australia Post. Like the PIO proposal, establishment of such an Ombudsman is not intended to extinguish the existing jurisdictions of bodies like the Commonwealth Ombudsman or the ACCC over Australia Post. Matters could be transferred between these bodies as appropriate.

The main advantage of an Australia Post Ombudsman is that it could be established relatively quickly (eg through Ministerial directive to Australia Post), and without new legislation.

The main issues with this option are:

- an Australia Post Ombudsman may not be supported by consumer groups, because such a body might not be considered sufficiently independent of Australia Post;
- if established like the Canada Post Ombudsman, the Ombudsman would have recommendatory powers rather than determinative powers, and could not bind Australia Post to one of its decisions;

- an Australia Post Ombudsman is expected to only be able to hear matters relating to Australia Post, and not about other postal operators (especially if set up by Australia Post);
- an Australia Post Ombudsman might replicate the Commonwealth Ombudsman's role; and
- Australia Post could incur costs for setting up the Ombudsman, in addition to ongoing compliance and investigation costs.

8.4 PIO Located in Another Commonwealth Regulatory Agency

Under this alternative, the PIO could be established either as:

- a new specialist branch or division of the regulatory agency; or
- an additional function of an existing branch or division of the regulatory agency (eg allocating the PIO functions to a legal or compliance division).

Commonwealth policy relating to the separation of the exercise of policy and regulatory functions is a factor. As a consequence, a Department could not assume this role. If this option were considered, the regulatory agency would need to have an understanding of the structure and business environment of the postal industry.

Under the option, the regulator could adopt some or all of the functions outlined in Chapter 3 and the jurisdiction in Chapter 4. It could also apply funding options under Chapter 6 (to ensure industry contributed to the cost of regulation), and/or one of the options for licensing or registration under Chapter 7. The PIO could then refer a postal operator to the regulator if the operator refuses to accept a PIO decision or fails to pay fees.

The main issues with this option are similar to those applying to placing the PIO in the Commonwealth Ombudsman's Office. There is also a risk of potential conflict between the PIO's role of reviewing disputes, and the regulator's role of ensuring compliance by the regulated bodies with any legislation. In addition, some regulatory bodies might be established or organised in a manner to monitor and enforce overall service standards, but not to handle individual complaints, and thus might not be able to assume the PIO role, without significant adjustments.

If the regulatory agency introduced licensing, compulsory registration or accreditation it would incur considerable establishment and maintenance costs. It might discourage postal operators from mediating complaints, especially if complaints raised breaches that could lead to loss of licence or deregistration. Licensing might also create an unintended barrier to entry to the postal industry.

The Department is seeking comment on the following matters:

- Could the alternatives outlined above offer a feasible alternative to the PIO? If so, please describe in what manner?
- What costs/benefits can be identified with the four options outlined above?
- What other alternatives could be considered and what are their costs/benefits?

9 SUBMISSIONS

Submissions on the discussion paper can be sent to:

Postal Industry Ombudsman Submissions
Enterprise and Radiocommunications Branch
Department of Communications, Information Technology and the Arts
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Submissions should be received by **Friday 29 November 2002**.

For further information regarding submissions, please call Mr Mooney on 02 6271 1842, or e-mail Paul.Mooney@dcita.gov.au.