

19 Feb 2010

Thomas John
Assistant Director
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National Circuit
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Dear Mr John

Reference concerning the integrity of ADR processes

I am writing to provide a brief response to the request for comments and views about the above reference.

I have previously provided NADRAC with information about my office, the Public Transport Ombudsman (PTO), in our submission to the NADRAC Enquiry into alternative dispute resolution and civil proceedings (attachment 1).

Confidentiality: Appropriate confidentiality between parties and the PTO is a critical element of our effective operations. We believe confidentiality is one of the significant reasons why parties agree to engage in Alternate Dispute Resolution (ADR), and that it promotes openness and honesty in communications.

We aim to achieve confidentiality of our ADR processes through a range of contractual and statutory means. These include the following:

- The PTO is an organisation to which the Commonwealth's Privacy Act 1988 applies. We are required to act in accordance with relevant privacy laws, which provide some protection for how we handle and disclose information. We have published a Privacy Statement which outlines how we deal with information.
- Where a formal conciliation conference is conducted, our standard agreement signed by both parties includes a confidentiality clause:

2.1 The PTO agrees not to disclose to any person information obtained from the conciliation of the complaint without the consent of the parties, unless compelled by law to do so.

2.2 The parties agree not to disclose to any person, other than the parties' professional advisors, information obtained during the conciliation of the complaint without the prior written consent of the disclosing party, unless compelled by law to do so.

- Sometimes, the terms of agreement for a matter which is informally conciliated may include a requirement that the agreement and other information are not disclosed.
- Where we are required to produce material to a court in response to a summons or subpoena, our standard correspondence includes the following request:

I note, in complying with the [summons/subpoena/notice], that the Public Transport Ombudsman provides an independent, industry-based dispute resolution service. I have attached a brochure outlining the services of my office.

An important aspect of effective alternate dispute resolution (ADR) is confidentiality. Reasons for this include:

- *confidentiality is commonly attributed as an important aspect of the agreement of parties to engage in ADR processes*
- *confidentiality affects the effectiveness of ADR processes, in that parties may not be as open without appropriate assurances of confidentiality.*

Because confidentiality is central to effective ADR, information obtained by the Public Transport Ombudsman in receiving, investigating and resolving disputes is regarded as private and confidential.

While confidentiality of itself is not generally a separate ground of privilege, I would ask that the Court consider the confidential nature of documents produced in granting access to them. In particular, I would ask that the Court only grant access for the necessary purposes of the proceedings, and that the Court apply appropriate conditions to access to limit the disclosure of the documents to persons other than those with a direct interest in the documents.

We also advise parties to the complaint about the summons, so that they are afforded the opportunity to appear in court to oppose the production of documents.

We will, in circumstances such as where a person threatens harm to another person, provide this information to other persons or organisations as appropriate. When doing this, we advise the person of the information that we will disclose, to whom it will be disclosed, and the reasons for the disclosure.

To date, our arrangements for confidentiality have provided a reasonably effective framework to promote frank and full disclosure of information for the purpose of our investigative and dispute resolution processes.

While a further statutory protection for the confidentiality of information obtained in our processes may provide some additional assurances for parties providing documents and other materials, we acknowledge that there is a range of competing public policy considerations relevant to this issue.

Non-admissibility: Given the nature of the disputes investigated and resolved by the PTO, it is fairly uncommon that we are required to make available information for court proceedings. As noted above, where documents or other material is required to be produced for legal proceeding, we provide information about our office and processes to the Court for its consideration when determining access to the material.

Where we conduct a formal conciliation conference, we will ask parties to agree that that information obtained is not used in subsequent court proceedings:

4.2 The parties will not require the PTO to:

(a) give evidence in relation to; or

(b) provide documents on issues arising from the conciliation of the complaint.

4.3 The PTO conciliation shall be regarded as without prejudice and nothing said or done during the course of the PTO conciliation of the complaint may be given in evidence in any proceeding and no documents created may be tendered in evidence or required to be produced in any proceedings.

A related area where we think continued reform may be beneficial is in respect of apologies. We are aware of initiatives in a number of jurisdictions (for example, the NSW *Civil Liability Act*) to provide that an apology does not constitute admission of liability, will not be relevant to the determination of fault or liability, and is not admissible in civil proceedings as evidence of fault or liability. We are also aware of the extensive work undertaken by some Ombudsman offices to promote the use of apologies – see for example *Apologies – a practical guide*, published by the NSW Ombudsman.

Our own experience is that the offering of an appropriate and meaningful apology at the outset can be an effective way to resolve many disputes. Where this is offered in the context of resolving disputes before the PTO, it often leads to a quick solution to an issue. Providing for such apologies not to be admissible in court proceedings may both encourage the use of ADR, and facilitate the resolution complaints.

Conduct obligations: PTO Ltd is a private company, and public transport operators in Victoria are members of the PTO scheme. The contract of membership brings with it obligations, such as:

- to inform customers about the PTO scheme
- to provide information for PTO investigations and dispute resolutions processes
- to comply with a determinations¹ where matters cannot be resolved.

We find a high degree of cooperation from public transport operators with our processes.

¹ Subject to limits as to the monetary value

For complainants, the decision to come to the PTO is a voluntary one. We make clear our expectations of the complainant at the outset, by providing information about our processes (attachment 2). This includes advice about providing us information, participating in our processes and treating us with respect. Ultimately, if complainants do not cooperate in our processes, and we are therefore unable to effectively deal with their matter, we have the option of discontinuing our investigation of the complaint and dismissing the matter.

Our conciliators are trained and supported in dealing with unreasonable conduct from any party to a matter.

Overall, we have found that these arrangements provide an appropriate framework for the conduct of parties before the PTO.

Immunity of ADR practitioners: There are clearly a range of competing considerations to be balanced when considering appropriate ways to regulate and protect ADR practitioners.

If concerns arise about the conduct of PTO conciliators, we have a complaints process, consistent with Australian Standard AS ISO 10002 – 2006, to deal with these concerns.

Where we conduct formal conciliation meetings, we ask parties to agree to indemnify our conciliators:

3.1 The parties agree that the PTO is not liable for any damage suffered (directly or indirectly) by any party arising in any way out of any act done or omitted to be done (including but not limited to, acts negligently done or omitted to be done) by the PTO in the performance of the PTO's obligations under this Agreement and the Rules.

3.2 The parties jointly and each of them severally indemnify the PTO against all claims arising out of or in any way referable to any act done or omitted to be done by the PTO in the performance of the PTO's obligations under this Agreement and the Rules.

We also have comprehensive insurance arrangements in place.

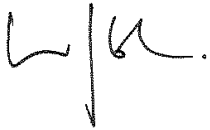
Overall, we have found our arrangements have worked sufficiently to date.

Conclusion: We acknowledge the difficult task in finding an appropriate balance between protecting ADR processes and those involved in them, and making sure that there is appropriate accountability.

As our submission to the NADRAC Enquiry into alternative dispute resolution and civil proceedings notes, one of the guarantees of the quality of work for industry ombudsman engaged in ADR is the National Benchmarks. The Benchmarks provide a framework that is an assurance for parties to a dispute that their case will be handled in an accountable, effective and fair manner.

If you would like to discuss any of the above comments, please contact me on 03 8623 2111.

Yours sincerely

A handwritten signature in black ink, appearing to be 'S. Cohen'.

Simon Cohen
Public Transport Ombudsman