

CHOICE

Submission to the Aviation Industry Ombuds Scheme -
Consultation Paper

October 2024

About Us

CHOICE

CHOICE is the leading consumer advocacy group in Australia. CHOICE is independent, not-for-profit and member-funded. Our mission is simple: we work for fair, just and safe markets that meet the needs of Australian consumers. We do that through our independent testing, advocacy and journalism.

To find out more about CHOICE's work visit www.choice.com.au/campaigns

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Introduction

Flying is an essential service for many Australians. It connects regional communities, provides access to vital medical services, unites family and friends for important occasions and helps Australians explore more of the world.

But for far too long consumers have struggled to obtain satisfactory outcomes when flights don't go to plan. Even when a consumer has clear rights to refund or some other remedy, it is far too difficult to enforce these rights because airline and airport customer service and complaints handling has been very poor. There also has not been an effective external complaints body to drive improvements in airline or airport practices.

CHOICE welcomes plans to establish an Aviation Industry Ombuds Scheme (Ombuds Scheme), but urges the Government to ensure we avoid the pitfalls from past attempts at airline complaints handling by establishing an ombuds scheme that is genuinely independent, effective, comprehensive, fair, free and transparent. To achieve this we recommend modelling the Ombuds Scheme on Australia's best examples of industry based dispute resolution: the Australian Financial Complaints Authority (AFCA) and the Telecommunications Industry Ombudsman (TIO).

In particular, we recommend the legislation establishing the Aviation Industry Ombud Scheme ensure that the Scheme is:

1. **Independent:** governed by a Board with an equal number of directors with experience representing consumers and the aviation industry, with an independent Chair;
2. **Effective:** established based on the [Benchmarks for Industry-based Customer Dispute Resolution](#);
3. **Comprehensive:** all airlines should be members - without exception - and eligibility to use the scheme should not depend on how someone booked a flight
4. **Fair:** led by a decision making approach based on the law, good industry practice and fairness in the circumstances with determinations that are binding on aviation industry members;
5. **Accessible:** consumers should not have to pay to use the scheme and the accessibility of particular consumer cohorts (eg people living with disability) should be considered; and
6. **Transparent:** empowered to collect and publish information from industry as it sees fit, including publishing determinations. CHOICE believes this transparency will also help promote competition between airlines in Australia by empowering consumers to choose airlines based on factors such as customer service or complaints handling practices.

CHOICE considers that many of the remaining details of the Scheme's operations, including details of funding, complaint and complainant eligibility and complaint resolution processes should be outlined in Scheme rules to be determined and amended by the Board. These Scheme rules (and any amendment) should be approved by the ACCC. This will ensure

flexibility for the operation of the Scheme to evolve as the aviation industry and consumer needs evolve. Nevertheless, we have briefly noted some of our views on these issues in this submission.

The ACCC should also be empowered to supervise and enforce aviation industry compliance with requirements to participate in and abide by the decisions of the Ombuds Scheme. To do this effectively, the ACCC should have a range of potential tools including administrative actions (eg infringement notices) as well as court-based enforcement options, and should be resourced to fulfil these new functions.

Recommendations

1. The legislation establishing the Ombuds Scheme should refer to **all** of the standards set by the Federal Treasury's *Benchmarks for Industry-based Customer Dispute Resolution*.
2. In addition to the examples included in the consultation paper, the legislation establishing the Ombuds Scheme should outline objectives including:
 - promoting competition in the aviation industry, by publishing information that may inform consumer decision making about airlines and airport customer service; and
 - identifying, *resolving* and reporting systemic issues.
3. The legislation establishing the Ombuds Scheme should outline the powers and function of the ombuds scheme, including the ability to make binding determinations, collect, share and publish data (including about systemic issues) and resolve systemic issues for all affected consumers (not just the complainant).
4. The legislation establishing the Ombuds Scheme should outline that the scheme should be governed by a Board with 3-5 directors with experience representing consumers, the same number of directors with experience in the aviation industry and an independent chair.
5. Membership of the Ombuds Scheme should be broad, without any exemptions. Consumers' ability to access or benefit from the Ombuds Scheme should not be affected by whether they booked through a travel agent or using frequent flyer points.
6. The legislation establishing the Ombuds Scheme should outline that the decision making approach will be informed by the law, good industry practice and fairness in the circumstances.
7. The legislation establishing the Ombuds Scheme should empower and require the Ombuds Scheme to publish its determinations.
8. Funding arrangements for the Ombuds Scheme should preserve independence of the scheme, while also giving the scheme certainty to operate and incentivising airlines to improve their practices.
9. The Ombuds Scheme should consider a wide range of complaints, including complaints about privacy. Businesses and not for profit organisations should also be eligible to make complaints.
10. Airlines should be required to resolve complaints within 15 days as many airline complaints are straightforward and should not require lengthy processes.

11. The Ombuds Scheme should have broad powers to collect information to understand the reasons for delays and cancellations.
12. The ACCC should be responsible for overseeing the operation of the Ombuds Scheme and should have a broad range of powers (including administrative options) to enforce aviation industry obligations to properly participate in the Ombuds Scheme. The ACCC should be resourced to fulfil these additional functions.

Legislation establishing the Aviation Industry Ombuds Scheme

This part of our submission outlines the crucial details that we consider must be addressed in legislation establishing the scheme.

Treasury's Benchmarks should be at the centre of the scheme

CHOICE urges the Government to ensure that the Ombuds Scheme is designed based on the standards set by the Federal Treasury's *Benchmarks for Industry-based Customer Dispute Resolution*.¹ These benchmarks (outlined below) are accepted as best practice amongst consumer advocates and are referred to in legislation establishing AFCA and the TIO.² The Benchmarks should similarly be mentioned in the legislation establishing the Aviation Ombuds Scheme.

The Benchmarks and their underlying principles and purposes

1. Accessibility

Underlying 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.

2. Independence

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

3. Fairness

Underlying 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.

4. Accountability

Underlying 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.

5. Efficiency

Underlying 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 its funding.

6. Effectiveness

¹ <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution>

² See *Corporations Act*, s 1051a (for AFCA) and *Telecommunications (Consumer Protection and Service Standards) ACT 1999*, s 128.

Underlying 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.³

The objectives should include promoting competition and accessible dispute resolution for consumers

CHOICE supports inclusion of each of the objectives outlined as examples in the Consultation Paper. However, we recommend that it be explicit that the objective is to provide *accessible* dispute resolution services for aviation customers - that is, consumers should not be charged to use the service, and accessibility needs of consumers living with disability or other consumer cohorts should be a core part of the Scheme's design.

We also recommend the objectives of the Ombuds Scheme include:

- promoting competition in the aviation industry, by publishing information that may inform consumer decision making about airlines and airport customer service; and
- identifying, *resolving* and reporting systemic issues.

CHOICE believes a well designed Ombuds Scheme can help promote competition in our airline market. An Ombuds Scheme with powers to collect and publish meaningful and comparable data may empower consumers to choose airlines based on this information. This could include, for example, data about timeframes to resolve complaints and the 'show cause' data that it is proposed the Ombuds Scheme will collect. In turn, this may encourage the airlines to more vigorously try and compete based factors such as customer service or on-time running of services.

A systemic issue is an issue that is likely to have an effect on one or more consumers, in addition to an individual complainant. We note that because a single airline or airport problem will often affect hundreds, if not thousands, of consumers it is crucial that the Ombuds Scheme is designed with systemic issues in mind. The Ombuds Scheme's objectives should clearly articulate its role in relation to systemic issues, and the ombuds should be empowered to resolve systemic issues (eg by ensuring all affected consumers are remediated) when they are identified. This should be in addition to reporting systemic issues to a regulator.

Powers and functions of the Ombuds Scheme

The powers and functions of the Ombuds Scheme should include the ability to:

³ Australian Government The Treasury, Benchmarks for Industry-based Customer Dispute Resolution, Principles and Purposes, February 2015 accessed at: https://treasury.gov.au/sites/default/files/2019-03/benchmarks_ind_cust_dispute_reso.pdf

- make determinations that are binding upon scheme members, but not binding upon complainants. This is important to ensure consumers may still pursue legal rights through the courts, and is how AFCA and the TIO operate.
- publish determinations (in a de-identified fashion)
- collect, publish, analyse and share information collected from scheme members, including information about systemic issues
- direct airlines to provide certain information to the ombuds scheme as needed
- resolve systemic issues for all affected consumers - for example, by directing the scheme member to conduct a remediation program to refund fares to a certain group of consumers affected by the same systemic issue.

Consumers should not be expected to provide all relevant evidence to the Ombuds Scheme. The information asymmetry between airlines and customers mean that, for example, consumers often may not know the reason for a flight cancellation or delay, whereas the airline will know. It is therefore important that the Ombuds scheme has sufficient powers to collect all information it needs from aviation industry scheme members to be able to determine complaints.

The Ombuds Scheme should be governed by a Board with an equal number of consumer and industry representatives

CHOICE supports establishing a Board for the Ombuds Scheme that is similar to the composition of the AFCA Board. This means there should be the same number of directors with experience representing consumers as there are directors with aviation industry experience. We believe there should be at least 3 but no more than 5 of each consumer and industry directors.⁴ We also support an independent Chair.

Depending on the role that the Ombuds may have in relation to disability access issues, the Government may also wish to consider whether one director with experience representing consumers should also have lived experience or experience representing people with disabilities. Another option would be to include a further independent director to represent people with disabilities.

CHOICE also supports ensuring the Board has similar power to the AFCA Board. For example, the Board's powers should include establishing and amending rules for the scheme, with appropriate regulatory oversight from the ACCC (see clause 12 of the AFCA Constitution).

However, the Board should **not** be involved in the establishment of the Charter of Rights or any decision making for individual complaints.

⁴ This is similar to AFCA: See section 4 of the AFCA Constitution.

Membership of the scheme should be broad

CHOICE supports broad inclusion of all airlines (including international airlines) and airports in Australia. We do not support any exemptions as every consumer deserves the same protections. We also would have difficulty supporting a phased approach that takes too long to come into effect. The problems with airline complaints handling are decades old and consumers should not have to keep waiting for a solution.

We note the Government does not intend to include travel agents in the scheme. We urge the Government to reconsider this decision as complex agency arrangements are a key reason consumers often experience difficulties enforcing their rights in the airline sector. If the Government is minded to maintain this position, we recommend ensuring that a consumer's rights in respect of dispute resolution will not be affected by whether a consumer books their flight through a travel agent. Consumers should have the same protections regardless of how they book.

We also suggest the Government consider whether frequent flyer companies will be required to be members of the scheme. As with travel agents, a consumer's dispute resolution protections should not turn on whether they used frequent flyer points to book their flight.

Decision making approach

One of the fundamental tenets of the approach of AFCA and the TIO is that decision making is not narrowly focused on only the law. Both AFCA and the TIO also consider good industry practice and fairness in the circumstances.⁵ CHOICE recommends that this also be reflected in the legislation establishing the Ombuds Scheme.

Transparency

Transparency about decision making will be crucial to establishing trust and confidence in the new Ombuds Scheme. Accordingly, we recommend that the legislation expressly empower and require the Ombuds Scheme to publish the determinations it makes (with relevant personal information de-identified). This will also give the aviation industry and consumers greater certainty about how the ombuds is approaching its decision making, and will provide an important source of evidence for determining whether any further law reform to consumer rights is needed.

We also recommend that the legislation expressly empower the Ombuds Scheme to publish complaints data in a way that enables comparison.

⁵ See for example TIO, Complaint Handling Procedures, 5.1.5 Recommended Outcome, accessed at: <https://www.tio.com.au/about-us/policies-and-procedures#/making-a-complaint-to-the-telecommunications-industry-ombudsman>

Components of the rules

Most details of the operation of AFCA and TIO are outlined in the respective schemes' rules. This provides flexibility for the operation of the scheme to evolve, based on development in consumer and industry needs, without having to change the legislative regime.

We recommend that a similar approach be adopted for the rules for the Ombuds Scheme. These rules, rather than legislative instruments, should outline details such as:

- Funding arrangements
- Complaint and complainant eligibility
- Complaint handling practices
- Guidance and reporting.

As outlined later, we believe the ACCC is the regulator that should have oversight of the operation of the Ombuds Scheme. This should extend to approving any amendments to the scheme rules. ASIC plays a similar role in respect of the rules at AFCA.

Funding arrangements

CHOICE supports having the aviation industry fund the Ombuds Scheme. The funding arrangements should look to preserve the following features that are essential to the effective operation of the Scheme:

- **Independence** - industry funding ensures the scheme is independent of Government, but it can undermine consumer trust in the operation of the scheme. To ensure trust is remained, it is essential that the scheme has strong governance arrangements with an equal role for representatives with experience representing consumer interests
- **Certainty for budgeting and planning** - the funding arrangements must give the scheme sufficient certainty about its annual budget to enable it to plan, hire and retail staff in an effective way. This means some funding arrangements must be determined up front and must be fixed to a degree.
- **Flexibility** - the funding arrangements must also preserve sufficient flexibility to enable the scheme's operations to 'scale up' during times of increased complaint volumes (for example after unexpected events such as the COVID pandemic). A degree of flexibility in the funding model can also incentivise better internal complaint handling by the airlines and so CHOICE supports a degree of 'user pays' funding (where airlines that receive more complaints end up having to pay more). However, as noted above, this must be balanced against the need for the scheme to have sufficient certainty about funding to be able to operate effectively.

Complaint handling

As noted above, we consider that details of complaint handling should be outlined in the Scheme Rules so that they can evolve as the aviation industry and consumer needs change over time.

Complaint and complainant eligibility

In relation to complaint eligibility, CHOICE supports inclusion of complaints that relate to the Aviation Customer Rights Charter, the Australian Consumer law, matters in contracts with customers and loss and damaged baggage. We also support inclusion of complaints about frequent flyer schemes and points.

Consumer concerns about the use of their data and privacy are growing and we consider that this is another appropriate complaint topic for the Ombuds Scheme to consider. We note the TIO and AFCA consider privacy complaints about financial firms and telco providers. The need to include privacy complaints, which likely would not have been considered within a scheme designed decades ago, also highlights why it is necessary for complaint eligibility to evolve over time - as airline operations become more data driven, there may well be new areas that it is appropriate for consumers to challenge (eg algorithmic or automatic decision making).

As noted earlier, we urge the Government to reconsider its decision to exclude travel agents from the scheme, and to at least ensure that a consumer's rights in respect of dispute resolution will not be affected by whether a consumer books their flight through a travel agent. It is likely that this may require the scheme to have some powers in respect of travel agents as they are the owners of bookings they make.

Finally, we support ensuring small businesses and NFPs can make complaints under the Ombuds Scheme. We also support consideration of whether larger businesses should also be able to make complaints given many consumers travel most frequently for work. We do not think it is desirable to create a scheme that results in different levels of protection if an individual is booking flights for work compared to personal uses. The power imbalance between airlines and individuals is the same in either case.

Complaint resolution process

We support the three stage process for complaint handling outlined in the consultation paper (internal dispute resolution, referral to the Ombuds Scheme and case management and determination by the ombudsperson). This process is well established in other sectors with Ombuds Scheme and helps encourage businesses resolve complaints early.

However, we urge the Government to ensure that the timelines built into this process are short and do not require consumers to wait for extended periods, particularly for complaints that are straightforward (eg in instances where the Charter of Rights provides clear rights to refunds).

Many airline complaints should be straightforward and we consider that 15 days should be ample time for an airline to resolve most complaints. We note that in financial services, where complaints can be complex requiring the collection of evidence from third parties (eg for insurance claims complaints) the timeframe is 30 days.

The time limit for consumers to make a complaint should be informed by appropriate limitation periods. Under the Australian Consumer Law, actions may be commenced within 6 years of the cause of action accruing, and so we believe 6 years is an appropriate time frame.⁶

Guidance and reporting

We support all of the publications proposed in the consultation paper, but believe that the Ombuds Scheme should have broad discretion to publish what it believes will appropriately help fulfil its objectives.

Accordingly, we believe the Ombuds Scheme should have broad powers to publish information as it sees fit (while acknowledging the need to protect individual privacy, which may warrant some de-identification of data or information). This should also extend to publication of data in a form that enables third parties to analyse trends in complaints over time - see for example the AFCA datacube⁷ as an example of this kind of data publication.

Aviation Customer Rights Charter

We look forward to engaging with future consultations on the Customer Rights Charters. CHOICE believes the Charter has the potential to provide consumers with clearer and stronger rights when flights are cancelled or delayed.

However, we query whether the Ombuds Scheme is the right body to design this Charter. Typically this kind of guidance on legal requirements or good practice would be provided by a regulator, such as the ACCC. It is possible that the Ombuds Scheme may have a conflict of interest in designing a Charter that it must also use to inform determinations. The Government may wish to ensure protections against this conflict in the design of the Ombuds Scheme - for example, by requiring that the Aviation Customer Rights Charter is approved by an independent body with expertise in consumer protection (eg the ACCC).

Procedural fairness

CHOICE recognises the need for procedural safeguards in the ombuds scheme's processes. We support these, but urge that the design of these processes do not unduly delay outcomes for consumers or transparency that could drive better industry practices.

⁶ Competition and Consumer Act, s 82

⁷ AFCA datacube: <https://data.afca.org.au/>

Show cause arrangement

CHOICE supports the proposed 'show cause' data reporting and ensuring the Ombuds person has appropriate powers to fully understand reasons for delay and cancellations.

Consumers often do not know why a flight is cancelled or delayed. In CHOICE's survey of 9000 consumers about delayed and cancelled flights, 63% of respondents who had a flight cancelled said there was no reason provided for the cancellation.⁸ This highlights the need for the Ombuds Scheme to have broad powers to collect information about the reasons for delays and cancellations. This will be essential to determining complaints fairly.

We also recommend the Government consider requiring greater transparency about the reasons for flight cancellations to help reduce the information asymmetry between consumers and airlines.

Scheme compliance and enforcement

As the regulator with most expertise and consumer protection, we believe the ACCC should be the key regulator with oversight of the Ombuds Scheme and compliance and enforcement of relevant requirements imposed upon the aviation industry. The ACCC should be resourced appropriately to fulfil these additional functions.

The ACCC should have a role in overseeing the operation of the scheme itself. As noted earlier, we believe the ACCC should approve any amendments to scheme rules over time.

We also believe the ACCC should have a broad range of powers to enforce obligations imposed on the aviation industry - eg obligations to participate in the scheme, to comply with directions, to provide remedies following determinations and to fund the scheme. This should include administrative powers such as infringement notices, so that there are fast and simple enforcement options that do not always require commencing enforcement action.

⁸ CHOICE's 2023 travel survey was conducted in October 2023 and received 8947 responses from supporters about their experiences with the aviation industry in Australia over the past 12 months.