



Commonwealth courts and tribunals

COMPLAINT-HANDLING PROCESSES AND
THE OMBUDSMAN'S JURISDICTION

August 2007

Report by the Commonwealth Ombudsman,
Prof. John McMillan under the *Ombudsman Act 1976*

REPORT NO. **12|2007**

Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal finding or report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

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EXECUTIVE SUMMARY

Difficult questions regularly arise about whether the Commonwealth Ombudsman is able to investigate a complaint about a court or tribunal and, equally importantly, whether the office is the appropriate body to look at the issues raised.

The Ombudsman initiated a project to review issues relating to the Ombudsman’s jurisdiction and the complaint-handling processes of courts and tribunals. The purpose of this report is to:

- improve the Ombudsman’s handling of complaints about courts and tribunals
- give courts and tribunals a clearer understanding of the Ombudsman’s role
- improve public understanding of the role of the Ombudsman in relation to courts and tribunals
- improve understanding of the complaint mechanisms available in the courts and tribunals themselves.

The Ombudsman’s office is also increasingly aware of persistent complainants who cause difficulties for courts and tribunals. It is particularly important for these complainants that the limits of the office’s ability to look at complaints are clearly understood by all interested parties. The growth in unrepresented litigants may also increase the difficulties, and consequently the complaints, for courts and tribunals.

This report is in three parts. Part 1 sets out the background and intended purpose of this project, while Part 2 sets out the statutory limits of the Ombudsman’s jurisdiction, and some of the difficulties in applying the current legislation. This part also talks about the factors the Ombudsman considers when deciding whether to investigate a complaint that is within the Ombudsman’s jurisdiction.

There are significant problems in applying the definitions in the legislation that set the boundaries for the Ombudsman’s jurisdiction. In particular, it is difficult to list those actions which are administrative, rather than judicial or adjudicative in nature. It is also difficult to create hard and fast rules to decide when it is appropriate for the Ombudsman to choose to investigate a complaint. It will often involve weighing and considering a range of factors.

Although this is a difficult area, the Ombudsman’s office is continuing to refine its role through working with courts and tribunals on individual complaints. The good working relationships that currently exist between the Ombudsman’s office and courts and tribunals are an essential part of this process. In the longer term, the Ombudsman believes that legislative reform would solve many of the definitional problems.

Part 3 sets out the complaint-handling processes of the courts and tribunals involved in the project. This is based on information provided by the courts and tribunals, including general comments about best practice in complaint handling.

The office greatly appreciates the contribution and involvement of all the courts and tribunals in this project. This report pulls together for the first time the jurisdictional issues and problems that regularly arise in handling complaints in this area. It is hoped that the report will be a useful resource for both users and staff of the Commonwealth courts and tribunals, and the Ombudsman’s office.

PART 1—INTRODUCTION

1.1 The purpose of this project was to:

- improve the Ombudsman’s handling of complaints about courts and tribunals
- give courts and tribunals a clearer understanding of the Ombudsman’s role
- improve public understanding of the role of the Ombudsman in relation to courts and tribunals
- improve understanding of the complaint mechanisms available in the courts and tribunals themselves.

1.2 In order to achieve this purpose, this report aims to:

- clearly state the legal framework of the Ombudsman’s jurisdiction, in particular identifying the legal issues and grey areas in jurisdiction
- present up-to-date information on the internal complaint-handling procedures of courts and tribunals.

1.3 In September 2006, the Ombudsman provided four courts and seven tribunals with a draft paper on what were considered to be the difficult areas in the Ombudsman’s jurisdiction. The draft paper also raised some issues about when the Ombudsman should, or should not, investigate a complaint, even where the matter was within jurisdiction.

1.4 The courts and tribunals involved in this project are listed below, with the abbreviation that has been used in the report:

- High Court
- Federal Court
- Family Court
- Federal Magistrates Court
- Administrative Appeals Tribunal (AAT)
- National Native Title Tribunal (NNTT)
- Veterans’ Review Board (VRB)
- Superannuation Complaints Tribunal (SCT)
- Social Security Appeals Tribunal (SSAT)
- Migration Review Tribunal (MRT)
- Refugee Review Tribunal (RRT)¹.

1.5 The courts and tribunals were also asked about how they handle complaints. The questions are listed in Appendix A.

1.6 Part 3 of this report contains a summary of each body’s complaint-handling processes, and some comments on the more common issues. This is not an assessment of how courts and tribunals handle complaints. The main objective in including this information was to identify common themes. It should also assist

¹ On 1 July 2007 the MRT and the RRT were combined into a single agency known as the MRT-RRT. The separate functions of the tribunals have not changed.

potential complainants to have collated information about court and tribunal complaint-handling processes.

1.7 This report is to be:

- provided to courts and tribunals for their information
- used internally in the Ombudsman's office
- made available to the public on the Ombudsman's website, to enable them to make informed choices if there is an issue they wish to raise with a court or tribunal.

PART 2—INVESTIGATIONS BY THE OMBUDSMAN

Overview

2.1 All courts and some tribunals are explicitly excluded from the Ombudsman’s jurisdiction, while other tribunals are within the Ombudsman’s jurisdiction. The registrars and staff of courts and tribunals are generally within jurisdiction. This jurisdiction is usually restricted to ‘administrative actions’, although the meaning of the term needs to be carefully considered. Where the Ombudsman’s jurisdiction extends beyond administrative actions, the office will generally exercise discretion not to investigate.

The Ombudsman’s jurisdiction over courts and tribunals

2.2 The Ombudsman is able to investigate action taken by a department or prescribed authority (s 5(1) of the *Ombudsman Act 1976*). Department is defined in s 3 of the Ombudsman Act and is not relevant to this discussion. ‘Prescribed authority’ is also defined in s 3, in the following terms:

- (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment.

2.3 On the face of it that definition covers all Commonwealth courts and tribunals. However, the definition in s 3 then goes on to exempt certain bodies from being a prescribed authority. The exemptions in paragraphs (a)(ii) and (a)(iii) are relevant to this report:

- (a)(ii) a body that has the power to take evidence on oath or affirmation and is required, or is expressly permitted, by an enactment to be constituted by, or to include among its members, a person who is a Justice or Judge of a court created by the Parliament or a person who has, by virtue of an Act, the same status as a Justice or Judge of such a court;

- (a)(iii) a body that, under [s 3(2)] or the regulations, is not to be taken to be a prescribed authority for the purposes of this Act .

2.4 The following table lists the courts and tribunals that are exempt from the Ombudsman’s jurisdiction under paragraphs (a)(ii) and (a)(iii).

Body	Applicable exception	Reason
High Court	(a)(ii)	The High Court shall consist of a Chief Justice and Justices (s 71 of the Constitution). The High Court may require and administer all necessary oaths and affirmations (s 77F of the <i>Judiciary Act 1903</i>).
Federal Court	(a)(ii)	The Federal Court shall consist of a Chief Justice and other Judges (s 5 of the <i>Federal Court of Australia Act 1976</i>). A Judge may require and administer all necessary oaths and affirmations (s 44).
Family Court	(a)(ii)	The Family Court consists of a Chief Judge, who shall be called the Chief Justice of the Court, a Deputy Chief Judge and Judge Administrators, Senior Judges and other Judges (s 21 of the <i>Family Law Act 1975</i>). The Rules of Court make allowance for evidence on oath or affirmation.

Federal Magistrates Court	(a)(ii)	The Federal Magistrates Court consists of justices styled Chief Federal Magistrate and Federal Magistrates (s 8 and clause 2, schedule 1 of the <i>Federal Magistrates Court Act 1999</i>). A Federal Magistrate (including the Chief Federal Magistrate) may require and administer all necessary oaths and affirmations for the purposes of the Federal Magistrates Court (s 58).
Administrative Appeals Tribunal	(a)(ii)	A person must not be appointed as the President unless he or she is a Judge of the Federal Court of Australia (s 7(1) of the <i>Administrative Appeals Tribunal Act 1975</i>). Section 40(1)(a) gives the power to take evidence on oath or affirmation.
Remuneration Tribunal	(a)(iii)	Under Regulation 4 of the Ombudsman Regulations the Remuneration Tribunal is not to be taken to be a prescribed authority.
Australian Competition Tribunal	(a)(ii)	A person shall not be appointed as a presidential member of the Tribunal unless he or she is a Judge of a Federal Court (s 31 of the <i>Trade Practices Act 1974</i>). Section 105 gives the Tribunal the power to take evidence on oath or affirmation.
Copyright Tribunal of Australia	(a)(ii)	A person shall not be appointed as the President unless he or she is a Judge of the Federal Court of Australia (s 140 of the <i>Copyright Act 1968</i>). Section 167 gives the Tribunal the power to take evidence on oath or affirmation.
National Native Title Tribunal	(a)(ii)	The President and Deputy President may be a Judge of the Federal Court (s 110 of the <i>Native Title Act 1993</i>). Section 156 gives the Tribunal the power to take evidence on oath or affirmation.
Pharmaceutical Benefits Remuneration Tribunal	(a)(iii)	Under Regulation 4 of the Ombudsman Regulations the Pharmaceutical Benefits Remuneration Tribunal is not to be taken to be a prescribed authority.
Defence Force Discipline Appeals Tribunal	(a)(iii)	A person is not qualified to be appointed as President or Deputy President unless he is a Justice or Judge of a Federal Court or of the Supreme Court of a State or Territory (s 8(1) of the <i>Defence Force Discipline Appeals Act 1955</i>). Section 33 gives the power to examine on oath or affirmation.

2.5 The following tribunals have no applicable exemption and therefore appear to be wholly within the Ombudsman’s jurisdiction:

- Migration Review Tribunal
- Refugee Review Tribunal
- Superannuation Complaints Tribunal
- Veterans’ Review Board
- Social Security Appeals Tribunal.

Jurisdiction over court and tribunal registries

2.6 There are two mechanisms for registry functions of courts and tribunals to fall within the Ombudsman’s jurisdiction. Firstly, under paragraph (bb) of the definition of prescribed authority, a chief executive officer (CEO) of a court or tribunal is taken to be a prescribed authority. ‘CEO’ is defined in s 3(1) of the Ombudsman Act to mean:

- (a) Clerk of the High Court²
- (b) Registrar of the Federal Court
- (c) Chief Executive Officer of the Family Court
 - (ca) Chief Executive Officer of the Federal Magistrates Court
- (d) Registrar of the Administrative Appeals Tribunal.

2.7 The regulations may also declare another office to be a CEO of a court or tribunal; none have been declared at this time.

2.8 Secondly, paragraph (c) of the definition of prescribed authority includes:

- (c) the person holding, or performing the duties of, an office established by an enactment, other than:
 - (i) the chief executive officer of a court or tribunal or a person who, for the purposes of this Act, is to be taken to be a member of the staff of the chief executive officer of a court or tribunal; or
 - (ii) a person who, under subsection (3) or the regulations, is not to be taken to be a prescribed authority for the purposes of this Act.

2.9 Several of the tribunals have a Registrar established by the relevant Act. These positions do not fall within the definition of a ‘CEO of a court or tribunal’ and therefore do not fall under the exception to a prescribed authority in subparagraph (i). The following offices are prescribed authorities subject to the Ombudsman’s jurisdiction in this way:

Registrar of the Migration Review Tribunal ⁽¹⁾	s 407 <i>Migration Act 1958</i>
Registrar of the Refugee Review Tribunal ⁽¹⁾	s 472 <i>Migration Act 1958</i>
Registrar of the Australian Competition Tribunal	s 44 <i>Trade Practices Act 1974</i>
Registrar of the Copyright Tribunal	s 170 <i>Copyright Act 1968</i>
Native Title Registrar of the National Native Title Tribunal	s 129 <i>Native Title Act 1993</i>
Registrar of the Defence Force Discipline Appeals Tribunal ⁽²⁾	s 19 <i>Defence Force Discipline Appeals Act 1955</i>

(1) The holders of these offices may fall within s 3(3)(c) of the Ombudsman Act, which provides that a person shall not be taken to be a prescribed authority by virtue of holding an office established by an enactment for the purposes of a prescribed authority. It does not affect the Ombudsman’s ability to investigate complaints, but does affect the way those complaints are handled—for example, it may change who is considered to be a ‘principal officer’ under s 3(1).

(2) This assumes that the Registrar’s actions are not considered to fall within s 19C(5)(d) which prevents the Ombudsman from investigating ‘action taken in connection with proceedings against a member of the Defence Force for an offence arising under any law, including a law of the United Kingdom as applying by virtue of a law of the Commonwealth, relating to the discipline of the Defence Force or of an arm or part of the Defence Force’.

² All references to this office were changed in 1994 to Chief Executive and Principal Registrar; under s 25B of the *Acts Interpretation Act 1901* this reference to the Clerk is construed as a reference to the position of Chief Executive and Principal Officer.

2.10 As a matter of history it should be noted that for a time the registries of the Federal Court, the Family Court and the AAT fell outside the Ombudsman’s jurisdiction. This followed a decision in 1989 to make the Chief Judges of both courts and the President of the AAT responsible for the administration of their registries (those registries had formerly been staffed by officers of the Attorney-General’s Department). The Senate Standing Committee on Finance and Public Administration recommended in 1991 in its report, *Review of the Office of the Commonwealth Ombudsman*, that the Ombudsman’s jurisdiction be expanded to cover the registries of the federal courts and the AAT. This recommendation was implemented by s 18 of the *Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994*, which amended the definition of ‘prescribed authority’ in s 3(1) of the Ombudsman Act to include the CEOs of certain courts and tribunals (see paragraph 2.6 above).

Staff of courts and tribunals

2.11 Under s 3(14) of the Ombudsman Act the following are taken to be members of the staff of the CEO of the court or tribunal:

- officers of a court and tribunal (expressly excluding a judge or member; see s 3(15))
- members of staff of the registry of a court or tribunal
- other Commonwealth employees whose services are made available to the court or tribunal.

2.12 The effect of this provision is to make it clear that the actions of staff are subject to the Ombudsman’s jurisdiction unless an exception applies.

2.13 If there is no CEO of a court or tribunal as defined in s 3(1), then the standard definition of ‘officer’ in relation to a prescribed authority applies (s 3(1)), and action taken by that officer is taken to be action of the prescribed authority (s 3(6)).

Other protection from Ombudsman investigation

2.14 Even when a tribunal falls within the Ombudsman’s jurisdiction, there is a question as to the operation of the protection provisions relating to tribunal members. Under their constituent legislation, members of the MRT, the RRT, the SSAT, and the VRB have the same protection and immunity as a Justice of the High Court (for example, *Migration Act 1958* s 373). The protection differs between tribunals; for example members of the SCT are not liable for actions or proceedings for damages (s 61 of the *Superannuation (Resolution of Complaints) Act 1993*), but have no general immunity. It is not clear to what extent these protective provisions would limit the ability of the Ombudsman to investigate. However, it is an indication that such investigation does not sit easily with the Ombudsman’s role.

2.15 The SSAT raised this issue in its response, emphasising the existence of statutory member protection (clause 21.1 of schedule 3 of the *Social Security (Administration) Act 1999*), which reinforces the view that Ombudsman investigation would not be appropriate for decisions or conduct of tribunal members in the performance of their duties.

Actions outside jurisdiction—administrative versus judicial actions

2.16 The Ombudsman has the power to investigate actions that ‘relate to a matter of administration’ (s 5(1)(a) of the Ombudsman Act). Tribunals are part of the

executive arm of government, and it is therefore possible that all actions taken by tribunals that are subject to the Ombudsman’s jurisdiction ‘relate to a matter of administration’. However, there is a counter argument that decisions that are adjudicative in nature, though not judicial, still do not ‘relate to a matter of administration’.

2.17 This difference is also relevant to s 5(2)(b) and s 5(2)(ba) of the Ombudsman Act, which puts specific actions outside the Ombudsman’s jurisdiction:

- (b) action taken by a Justice or Judge of a court created by the Parliament; or
- (ba) action by the chief executive officer of a court or by a person who, for the purposes of this Act, is to be taken to be a member of the staff of the chief executive officer of a court:
 - (i) when exercising a power of the court; or
 - (ii) when performing a function, or exercising a power, of a judicial nature.

2.18 These subsections apply only to courts, and CEOs of courts (namely, the Chief Executive and Principal Registrar of the High Court, the Registrar of the Federal Court, the CEO of the Family Court and the CEO of the Federal Magistrates Court).

2.19 In their responses, several courts pointed out that it is not easy to define those functions which are judicial or administrative. There is some case law on the distinction between judicial and administrative actions. Generally speaking, actions and decisions of a Registrar in managing individual cases as they progress from filing through to hearing and determination, including accepting or rejecting documents for filing, are considered by the courts to be judicial in nature. To further clarify this point, the High Court explained:

... when Registry staff make decisions or take actions in relation to the case management of matters filed in Court, they are exercising the powers of the Court pursuant to both the applicable legislation and the Rules of Court made pursuant to the *Judiciary Act 1903* (Cth).

2.20 The Family Court suggested that the acid test is where a remedy must be sought for a particular action. If the remedy for an action or decision would require action, including directions, by a Judge (or an officer of the court acting under a delegation from or direction by a Judge), then that action or decision is unlikely to be administrative. The Family Court suggested the following situations as a non-exhaustive list of examples of non-administrative matters:

- the assignment of judges to cases
- arrangements for the use of rooms
- the listing and management of cases
- action taken in relation to reports of the family consultants, prepared under the order and direction of the court.

2.21 The last dot point, relating to reports of family consultants, has arisen in previous complaints to the Ombudsman’s office. The view taken by the office was that the consultants were not exercising a power of the court. The Ombudsman has nevertheless accepted that the court will usually be the better forum in which a person can question a consultant’s action or report. In short, even if there is a jurisdiction to investigate, it may be better to exercise discretion not to investigate the matter.

2.22 For the Federal Court, the main areas of uncertainty in recent times have arisen where:

- the registry is acting pursuant to Rules of Court—such as refusing to accept a document for filing because it appears on its face to be an abuse of process
- the registry is acting in accordance with ‘administrative’ directions given by a Judge—such as a requirement that documents from a certain litigant not be accepted for filing unless first inspected by the Judge, or that a litigant only communicate with a Judge through the registry (rather than by contacting the Judge’s chambers)
- the registry is giving effect to administrative arrangements put in place by the Chief Justice for the ‘orderly and expeditious discharge of the business of the Court’—such as the system for allocating matters to Judges.

2.23 Section 5(2)(b) and s 5(2)(ba) of the Ombudsman Act do not apply to the AAT. However, as the Ombudsman may only investigate actions that relate to a matter of administration (s 5(1)(a)), it is still important to distinguish between functions of the AAT which are administrative in nature and those which are not. Staff of the AAT may have statutory powers under the *Administrative Appeals Tribunal Act 1975* (AAT Act) which do not appear to be administrative in nature. These include:

- decision to waive or not waive an application fee—regulation 19(6)
- decision to charge a single application fee for two or more applications—regulation 19(5)
- issuing of a direction—s 33(2) of the AAT Act
- issuing a summons—s 40(1A) of the AAT Act
- conducting an alternative dispute resolution process—s 34C of the AAT Act.

2.24 The Federal Magistrates Court believes some examples would help members of the public and other interested bodies to understand the distinction between administrative and judicial matters. The Federal Magistrates Court and the Family Court have recently updated their public material on complaint processes. A fact sheet called *Complaints and feedback* is on the Family Court website.

2.25 The President of the NNTT has a role in managing the administrative affairs of the tribunal under s 128(1) of the Native Title Act. Although the NNTT itself is not within the Ombudsman’s jurisdiction, the President, when acting administratively as an individual (for example, entering into a contract for supply of goods), may be a ‘prescribed authority’. However the office would normally not investigate any action of the President that was more properly regarded as the action of the NNTT.

2.26 This office has found that courts and tribunals are willing to discuss the jurisdictional issues around particular complaints as they arise. The High Court pointed out that despite an action being outside the Ombudsman’s jurisdiction, if the office does raise an issue the High Court would usually respond with a further explanation of why the particular action was taken.

2.27 The small number of complaints to the Ombudsman about courts and tribunals mean that issues can be talked through on an individual basis. The office appreciates the readiness of courts and tribunals to talk through these difficult issues. For example, the Family Court said:

The Court’s broad approach, while respecting what we see as boundaries within which we must work, aims to focus less on a formal assertion of those boundaries than on working with your officers to provide, as much as possible, practical relief for our mutual clients.

The Ombudsman may choose not to investigate

If there is an available right of review to a court or tribunal—s 6(3)

2.28 Under s 6(3) of the Ombudsman Act, the Ombudsman has discretion not to investigate a complaint if it is considered the complainant has a right to review by a court or tribunal, which has not been exercised. This exception is especially relevant to the proceedings of tribunals, which in some instances can be appealed on the merits and the law to another tribunal, and in all instances on the law to a court.

2.29 In practice, the Ombudsman’s office often chooses not to investigate complaints about Centrelink or the Department of Veterans’ Affairs, where complainants are able to apply to the SSAT, the VRB or the AAT, or migration and refugee applicants who are able to apply to the MRT or the RRT. The office may also decide not to investigate if there is a limited time from the date of the decision to apply for tribunal review, and that time limit is not extended by Ombudsman investigation.

2.30 The same considerations apply when a complainant has a right to review by a court. However, the Ombudsman’s office is more likely to investigate these complaints than complaints where there is a right to review by a tribunal. A relevant consideration in this decision is whether there are barriers to accessing the right of review, as discussed in the following paragraph.

2.31 In general, if there is an available review process, the Ombudsman’s office considers a number of factors in deciding whether to investigate a matter. The following factors make the Ombudsman lean towards deciding to investigate.

- If there is a likelihood that the review process will not be able to solve the problem. For example, while a tribunal can review certain decisions, the tribunal may not have any useful role in dealing with a complaint about the conduct of an official.
- If the particular case involves an unintended and anomalous effect of unambiguous law (subject to the matter having first been considered by the agency).
- If the remedy or other action that a court or tribunal or other body could provide would not provide an adequate or appropriate resolution of a grievance.
- If there are significant access barriers to court or tribunal review. For example, some review processes involve significant application fees, or procedural complexity that makes it necessary for a person to have professional assistance. The personal circumstances of some complainants are such that they would be unable to represent themselves or instruct another person to represent them.
- If a complainant’s difficulty in seeking court or tribunal review is not caused by the complainant. On the other hand, the office would be less likely to investigate a complaint where the process has been made more complex by

a complainant’s actions, for example, a failure to appeal within a specified time limit.

2.32 When deciding not to investigate a complaint under s 6(3) of the Ombudsman Act, the Ombudsman is expressly excluded from considering rights of review under the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act). In effect, the Ombudsman can investigate notwithstanding that the complainant could seek judicial review under the AD(JR) Act.

If the action is being, or has been, reviewed by a court or tribunal—s 6(2)

2.33 Under s 6(2) of the Ombudsman Act, the Ombudsman cannot investigate complaints about action if a complainant has, or is having, that action reviewed by a court or tribunal, unless it is considered that there are special reasons to investigate.

2.34 Complaints to this office will often involve both the substance of the initial action and the subsequent handling of the review process by a tribunal. Complaints may therefore involve both issues that are being or have been reviewed, and issues that have not. The Ombudsman’s view is that the office has no role in investigating complaints that are primarily about the substance of the review decision.

2.35 The Ombudsman’s policy, as supported by the words of s 6(2), is that a matter which can more suitably be dealt with by a court or tribunal should be handled in that forum. Whether there is a special reason to justify an Ombudsman investigation is an issue to be decided separately in each individual case. An example of where the Ombudsman has sometimes conducted an investigation is where the issue under complaint cannot by its nature be dealt with as a separate issue in the proceedings of a court or tribunal. Furthermore, courts and tribunals sometimes draw attention to issues that warrant investigation but have not been dealt with fully in the review.

2.36 In his response, the Principal Member of the VRB stated:

[c]onsistent with what appears to be the intention of the legislation (particularly s 6(2) and s 6(3) of the *Ombudsman Act 1976*) I feel that the Ombudsman should have no role in relation to the VRB’s adjudicative functions and the conduct of hearings. It would run counter to the objects of establishing independent tribunals within a comprehensive system of merits and judicial review for another form of executive oversight of adjudication to be superimposed.

2.37 This statement has been quoted in full, as it is a succinct summary of the Ombudsman’s views on the matter. For precisely the reasons put forward by the VRB, the office would not normally investigate complaints that are essentially about the adjudicative functions of a court or tribunal.

2.38 The MRT and the RRT also highlight the existing judicial scrutiny of tribunal decisions by the Federal Magistrates Court, the Federal Court and the High Court. With a high level of appeal (currently about 40% of RRT decisions are appealed to the Federal Magistrates Court), the additional layer of Ombudsman investigation would be neither desirable nor appropriate.

2.39 The RRT also drew attention to the oversight the Federal Parliament has in relation to RRT reviews which are not completed within 90 days. The Principal Member is obliged to report reasons for non-compliance with the time limit to the Minister, who is then required to table the reports in the Parliament. This type of oversight is a strong indicator that Ombudsman investigation is not appropriate for complaints about RRT delay.

2.40 The SSAT also commented on the specific legislative scheme for statutory review of SSAT decisions, and the clear parliamentary intention that the AAT is the appropriate body for review of SSAT decisions.

2.41 The SCT raised an interesting situation where a complaint has been made to the Ombudsman about a matter of administration that relates to a case that is currently before the tribunal. The Ombudsman’s investigation of that complaint would not impact on the substantive consideration of the case by the SCT, but a consequent negative decision by the SCT may be perceived by the complainant as influenced by the fact of the investigation; that is, the complainant may feel ‘punished’ for making a complaint, and may then raise an issue of apprehended bias. In some situations it may be possible for the Ombudsman’s office to investigate without advising the relevant Member of the identity of the complainant. Ombudsman investigation officers will consider this approach when starting an investigation about a current case.

2.42 In order to investigate a complaint that is being, or has been, reviewed by a court or tribunal, the Ombudsman must consider that there are special reasons to investigate. The Ombudsman weighs the circumstances of each case against the following factors, which incline against investigating a complaint that is, or has been, reviewed by a court or tribunal.

- The purpose of the court or tribunal proceeding is to obtain a binding decision that will resolve the dispute between the parties.
- Where a court or tribunal process is settled, such a settlement should usually be seen as settling all claims and disputes between the parties.
- Investigation may complicate the making and defence of claims in a court or tribunal, as parties may be compelled or persuaded to disclose to the Ombudsman what would normally not be disclosed in the other process.
- A person may feel constrained about disclosing to the Ombudsman information decided in the court process to be subject to non-publication.

Decisions and member conduct

2.43 Concerns are sometimes raised about the conduct of a review body member—for example, alleged rudeness to a party or witness. The Ombudsman cannot investigate the actions of judges in conducting cases. While the Ombudsman could investigate the actions of many tribunal members (but not AAT members), the usual position is that these matters should be raised with the head of the tribunal, who may investigate the complaint personally. It is worth noting that members of tribunals also have a form of legislative protection in relation to actions done in their tribunal role (see earlier discussion at paragraph 2.14).

Conclusion

2.44 As a general rule the Ombudsman can be said to have jurisdiction over the administrative actions of courts and tribunals, but not over their judicial or adjudicative actions. Nevertheless, the complexity of the specific rules is such that it is important to consider the detailed provisions discussed above to clarify the situation in any particular case. This report is intended to assist in clarifying the Ombudsman’s approach to investigation.

PART 3—COMPLAINT-HANDLING PROCESSES

Introduction

3.1 This section discusses the different complaint-handling processes of the courts and tribunals. As stated earlier, this is not intended to be an assessment of how courts and tribunals handle complaints. The main aims in including this information are to identify common themes and draw attention to best practice in specific areas.

3.2 The range of practices is discussed under subject headings. The questions asked of the courts and tribunals about their complaint handling are at Appendix A. A summary of each agency’s response is in a separate attachment, available on the Ombudsman’s website.

Diversity of complaint-handling procedures

3.3 There is a wide degree of variation in procedure across the surveyed courts and tribunals. Unsurprisingly, the organisations that receive the most complaints tend to have more comprehensive procedures. As shown below, some of the courts and tribunals receive very small numbers of complaints.

3.4 Figure 1 shows the average annual number of complaints the Ombudsman has received for each agency over the period 1 January 2002 to 31 December 2005, the number of complaints for each agency received by the Ombudsman in the 2005–06 period, and the number of complaints received in the same period by the courts and tribunals. The Ombudsman received at least one complaint about each court or tribunal during 2005–06, except the NNTT and the VRB, where the office received no complaints.

3.5 Figure 1 also allocates the complaint-handling procedures of each court and tribunal to the following broad groups:

- A complaints are handled on a case-by-case basis as they arise by a senior officer of the court or tribunal
- B complaints are handled on a case-by-case basis by a specified staff member
- C complaints are handled by a designated officer with responsibility for complaint handling, supported by agency-wide broad guidelines and procedures.

3.6 These labels are a description only, and are not an assessment or grading of the quality of the complaint-handling procedures. Figure 1 is a visual guide to the range and types of processes.

Figure 1: Summary of approaches and complaint-handling processes

Court/Tribunal	Average number of approaches received annually by Ombudsman 2002 to 2005	Number of approaches received by Ombudsman 2005–06*	Number of complaints received by courts and tribunals in 2005–06**	Complaint-handling process		
				A	B	C
Superannuation Complaints Tribunal	17	11	Record not kept		X	
Migration Review Tribunal	27	26	17	X		
Refugee Review Tribunal	5	4	8	X		
National Native Title Tribunal	Less than 1	0	1		X	
Social Security Appeals Tribunal	17	23	15			X
Administrative Appeals Tribunal	20	32	39			X
Federal Magistrates Court	8	8	134		X	
Federal Court	7	17	23		X	
Family Court	101	95	272			X
High Court	6	13	Record not kept	X		
Veterans’ Review Board	Less than 1	0	18	X		

* taken from the Commonwealth Ombudsman 2005–06 Annual Report

** as provided to Commonwealth Ombudsman in response to initial questions.

Key to processes:

A. case-by-case basis by a senior executive

B. case-by-case basis delegated to specified staff member

C. case-by-case basis by designated officer, with broad guidelines and procedures.

3.7 Most courts and tribunals indicated that complaints, once received, were transferred to the relevant person within their organisation for resolution or allocation. In some instances this is the Regional or District Registrar, the CEO, a case officer or other designated person. Where the complaint was in relation to the conduct of a board member, most courts and tribunals transferred such complaints to their Principal Member, Chief Justice or equivalent.

Staff

3.8 Most organisations do not have separate complaint-handling staff or a formal process. This is due to the generally low number of complaints received. For example, the NNTT, which received only one complaint in 2005–06, does not have a dedicated complaint-handling officer. The NNTT advised that complaints are handled by the Public Affairs team, which keeps up-to-date with complaint-handling methodologies. In contrast, the Family Court, which received 272 complaints in the period, has a formal process in place and provides specific training and on-going information to staff.

3.9 The SCT has a dedicated officer who deals with all complaints. This officer receives on-the-job training in complaint handling during their initial three-month induction period. The SCT does not keep records of how many complaints it receives, but estimates it would be a low number.

3.10 Both the High Court and the VRB have advised that it is not necessary to provide training for staff, due to the fact that the Principal Registrar and Principal Member respectively take sole responsibility for handling complaints.

3.11 Training on the handling of complaints is mainly done via on-the-job training, with the exceptions of the Federal Magistrates Court (which gives basic training on the principles of complaint handling to all new staff), and the Family Court (which provides ongoing training and information to staff). The Federal Court advised us that it is in the process of developing a training program that includes complaint-handling procedures.

3.12 There are advantages in providing training in complaint handling to all staff in an organisation, not just those who handle complaints. Staff who deliver services to the public may be able to use complaint-resolution techniques at the initial point of contact. Although this may not be expressly recognised as ‘complaint handling’ by organisations, it can be an important front-line role in resolving complaints.

3.13 The Ombudsman considers that training staff in complaint handling is an important aspect of overall skill development. Staff are more likely to be in a position to offer a creative or alternative solution to a problem if they have an understanding of how to handle complaints, as well as a thorough understanding of the organisation’s policies and procedures. The Ombudsman is revising the *Better Practice Guide to Complaint Handling*, which discusses these issues.³

3.14 Even with small numbers of complaints, it is important to ensure that there is some succession planning for staff turnover. While on-the-job training is very effective and practical, there is a risk that valuable corporate knowledge can be lost if it is not formally recorded.

Access

3.15 Good access is an important part of a quality complaint-handling system. At a basic level, members of the public should be aware of, and understand, their rights and responsibilities. If they wish to make a complaint, members of the public should be able to easily find out who to contact, and be able to make that contact in a variety of ways. Experience has shown that most people prefer to make a complaint by telephone.

3.16 There were no restrictions placed by the courts and tribunals on the way in which complaints could be made. The Federal Magistrates Court, the Family Court and the Federal Court encouraged complaints of a complex nature received by telephone to be put in writing. Unlike other government agencies, most complaints to courts and tribunals are received in writing, which may reflect the more formal processes and issues involved in court and tribunal work. In some instances, complaints were received via the Minister, or referred from the Ombudsman.

³ Commonwealth Ombudsman *Better Practice Guide to Complaint Handling* to be published in 2007.

Subject matter of complaints

3.17 All the courts and tribunals advised us that complaints are often about the substance of a decision. In these cases, the matter cannot be handled as a complaint, but must be appealed through the appropriate higher court. This also reflects the Ombudsman’s experience, where many of the approaches to the office are about the decision itself. As discussed in Part 2 of this report, these complaints are outside the Ombudsman’s jurisdiction.

3.18 Except for this provision, there were no restrictions placed by the courts and tribunals on the types of complaint they would consider. The AAT advised that it does not process anonymous complaints, however it does consider the matters raised in an anonymous complaint. Those courts and tribunals that do accept anonymous complaints may be limited in their ability to resolve them.

3.19 All the courts and tribunals indicated that the majority of their complaints would be related to matters outside the jurisdiction of the Ombudsman’s office. Complaints received by the Ombudsman about courts and tribunals, and which were within jurisdiction, were predominantly about delay. Other issues included information on the internet, a failure to act and general errors in administration.

Record keeping

3.20 Most of the courts and tribunals keep records of complaints electronically in some form of database. The Ombudsman considers that best practice requires sufficient records for an organisation to be able to:

- track and monitor the complaint and its resolution
- extract and report on data
- measure the organisation’s performance.

3.21 The VRB only maintains hard copy files. The High Court and the SCT both state that they do not maintain complaint statistics due to the low volume. Figure 1 shows that the VRB received 18 complaints last financial year, while the Ombudsman’s office received no complaints about the VRB. Although the High Court does not keep a record of numbers of complaints made to itself, in 2005–06 the Ombudsman received 13 complaints about the High Court.

3.22 Because of the relatively small numbers of complaints received, most courts and tribunals do not have a formal process for collecting information about possible systemic issues, although the SSAT maintains a feedback database.

3.23 The collection and comparison of detailed information about complaints can provide useful feedback for continuous improvement. Issues that arise from complaints can be used to improve the quality of an agency’s service delivery. Other peripheral information about complaints can also be useful. For example, the location of complainants, and the way in which complaints are received, can be a useful measure of the effectiveness of outreach programs, of website design, and of an organisation’s general accessibility to the public.

3.24 Documenting complaints helps to ensure consistent complaint handling over time and across the organisation. Consistent complaint handling is likely to also be fair, timely and transparent.

Remedy

3.25 The primary remedy across all courts and tribunals is a further explanation for the complainant. All the surveyed agencies advised that they went to considerable effort to explain the relevant processes and reasoning when responding to complaints. Where a fault is identified, all agencies advised that they provide an apology to the complainant, and identified and addressed the root cause of the error.

3.26 Generally, remedies are tailored to the individual complainant. None of the agencies specifically mentioned the payment of compensation. It appears that it would be rare for a complainant to suffer financial loss that would warrant compensation.

Notification of the right to complain to the Ombudsman

3.27 It is important that customers be made aware of the existence of avenues for complaint. Most agencies referred unsatisfied complainants to the Ombudsman, although approximately half of the surveyed agencies do not refer complainants to the Ombudsman as a general rule—only when the need arises.

3.28 Several organisations specifically included the Ombudsman in relevant publications. For example, the MRT and the RRT mention that a complaint can be made to the Ombudsman’s office in their Service Charter and fact sheets. In its Service Charter, the SSAT also refers to the possibility of Ombudsman involvement.

Timeliness

3.29 The length of time taken to resolve complaints varies widely across the surveyed agencies. Figure 2 shows the average time taken to resolve complaints for each court and tribunal, and the average time taken by the Ombudsman’s office. Given the small numbers of complaints (see Figure 1 on page 14) and the variation in complexity of complaints, no useful comparisons can be made across agencies.

Figure 2: Time taken to resolve complaints

Court/Tribunal	Time taken—agency	Time taken (average)—Ombudsman
Superannuation Complaints Tribunal	Under 5 days	37 days
Migration Review Tribunal	1 to 10 working days	20 days
Refugee Review Tribunal		28 days
National Native Title Tribunal	42 days	17 days
Social Security Appeals Tribunal	1 to 52 days	12 days
Administrative Appeals Tribunal	Average 10 days	14 days
Federal Magistrates Court	Within 28 days	17 days
Federal Court	Within 21 days	9 days
Family Court	Within 20 days	12 days
High Court	Up to 1 month	14 days
Veterans’ Review Board	Few days to few months	23 days

APPENDIX A—QUESTIONS

Questions put to each of the surveyed courts and tribunals in relation to their complaint-handling processes

In the initial letter to the agency

1. Are there any express limits on the type of complaints that can be considered?
2. Are there any requirements of complainants (for example, that a complaint must be in writing, or an application fee)?
3. How many complaints did you receive in 2005–2006?
4. How long do complaints take to resolve?

Supplementary

We also asked a subsequent written question querying how the agency advised the public that they are able to complain to the Commonwealth Ombudsman.

In the follow up phone call

1. How do you receive your complaints? (For example, mainly letter, some phone etc)
2. What happens to a complaint when you receive it? (How is it processed, is there a designated person who deals with them, is there a documented process etc)
3. What sorts of remedy do you provide? (For example, mainly apology, explanation of detail in plain English etc)
4. What happens when the process fails to bring a resolution? (Who do you refer complainants to, and how do you do this?)
5. Does your information include details about contacting the Commonwealth Ombudsman, and at what stage this information was provided?
6. Is there training provided to staff about correct complaint-handling procedures?

Responses

A summary of the individual response of each court and tribunal against all of the above questions is available to view or download on our website at www.ombudsman.gov.au. Alternatively, to obtain a printed copy of this summary please contact the Ombudsman’s office:

Phone 1300 362 072 (local call charge)
Email ombudsman@ombudsman.gov.au
Fax 02 6249 7829
Mail GPO Box 442
Canberra ACT 2601

APPENDIX B—GLOSSARY

AAT	Administrative Appeals Tribunal
CEO	Chief Executive Officer
Cth	Commonwealth
MRT	Migration Review Tribunal
NNTT	National Native Title Tribunal
RRT	Refugee Review Tribunal
SCT	Superannuation Complaints Tribunal
SSAT	Social Security Appeals Tribunal
VRB	Veterans’ Review Board