

# how the ombudsman helped people

The core function of an Ombudsman's office is to receive and investigate complaints from members of the public. The complaints range across the entire spectrum of Australian Government decision making—in areas as diverse as Centrelink debt recovery, management of immigration detention facilities, taxation assessment, conduct of police inquiries, assessment of custom duties and handling of Freedom of Information requests.

*'This chapter provides a fuller picture of the work of the Ombudsman ...'*

The complaints also range in complexity. Many are about the smaller irritations that people experience in their dealings with government, such as discourtesy and delay. Other complaints express dissatisfaction with how complex legislation has been applied in an individual instance, or question the essential principles of a substantial government program.

The work of the Ombudsman is mostly known through the investigations undertaken by the office. Some investigations culminate in a formal finding of defective administration against a government agency. Many other investigations that span a great deal of time and investigative work conclude that there was no agency error. In either case, there can be a demonstrable public benefit—correcting defective administration in one instance and, in the other, allaying any such concern by an independent and objective examination of a grievance against government.

Investigative work, although the most prominent role of the Ombudsman, is just one aspect of how the Ombudsman helps people in their dealings with government. This chapter provides a fuller picture of the work of the Ombudsman by looking at the different ways in which the office handles

the 25,000 or more complaints, inquiries and other approaches it receives each year.

## HELPING TO RESOLVE COMPLAINTS IN A SYSTEMATIC FASHION

The philosophy of best practice complaint handling to which the Ombudsman's office is committed is in line with good dispute resolution principles. These principles stress that an agency should generally be given the first opportunity to consider a complaint and resolve it. Complaints can then be addressed at their source directly with the agency. Often this speeds the process of complaint resolution. By handling complaints directly, agencies are better placed to learn from their mistakes, to clarify any public misunderstanding about the agency's policies and practices, and to rebuild trust with their clients.

*'... assisting complainants to use an agency's internal complaint-handling process ...'*

Ombudsman staff will often suggest that a complainant first raise a matter with the agency concerned. In fact, the majority of complaints and inquiries to the Ombudsman are handled in this way. This process is specifically recognised in s 6(1A) of the *Ombudsman Act 1976*, which gives the Ombudsman the authority to decline to investigate a complaint that has not yet been raised with the relevant agency. We see this as an important function of the office—to explain to people why they should first go to the agency, to provide advice on how to approach the agency, and to invite them to approach us again if they remain dissatisfied with the agency's response to their complaint.

The principle of assisting complainants to use an agency's internal complaint-handling process is viable only if the Ombudsman's office can have

confidence in that process. Ombudsman staff work with complaint-handling areas within agencies to ensure that complaints are handled seamlessly and professionally. For example, we have an ongoing arrangement with the Australian Taxation Office (ATO) internal complaint-handling unit, ATO Complaints, that it will accept a referral from the Ombudsman's office with the agreement of a complainant who has not previously contacted the ATO. This avoids the need for a complainant who has first contacted our office to repeat the details of their complaint to the ATO. ATO Complaints or the relevant ATO business line will then seek to resolve the matter and advise the complainant directly of the outcome and any remedy. An example is provided in the *Prompt and courteous response* case study.

The referral of complaints is also an in-built aspect of the legislation for handling complaints about the AFP. This process allows for the conciliation of relatively minor complaints—a quick and effective way of resolving such complaints, as the *Improvements to policies* case study illustrates.

In 2004–05, the Ombudsman will examine how well the complaint referral function is working. This function was partly addressed by the 2004 Client Satisfaction Survey (discussed in the

'Performance report' and 'Challenges' chapters of this report). Two issues were assessed: the extent to which complainants took our advice to complain directly to the relevant agency; and their satisfaction level upon doing so. The survey results suggest that most complainants followed our suggestions and pursued their complaints with the agency concerned. Disappointingly, the level of satisfaction among complainants with agency complaint handling was lower than we would hope. The latter issue is something we are able to address if the complainant returns to this office after contacting the agency. The Ombudsman will also take up the issue, possibly by an own motion investigation on the performance of agency complaint-handling units.

## HANDLING COMPLAINTS FROM MEMBERS OF PARLIAMENT

A distinctive role of the Ombudsman is to handle complaints referred from Members of Parliament (MPs). The link between Parliament and the Ombudsman is strong and historically rooted. The first ombudsman in Australia (in Western Australia) was described as the 'Parliamentary Commissioner for Administrative Investigations'—as, initially, was the Queensland Ombudsman.

### CASE STUDY prompt and courteous response

Mr X, a tax agent, wrote to us on behalf of a client, complaining about an ATO decision not to remit the General Interest Charge on a tax debt.

We telephoned Mr X and explained why we believed it would be useful for his complaint to be taken up first with the ATO. We advised Mr X about our transfer arrangements with the ATO and Mr X authorised us to transfer his complaint directly to ATO Complaints.

Mr X wrote back to us several weeks after the transfer, advising us that the ATO had acted promptly and courteously in response to the complaint and had granted a financial remedy that was entirely to his client's satisfaction.

### CASE STUDY improvements to policies

Ms F complained that during her time in Australian Federal Police (AFP) protective custody she was refused access to a translator. Ms F also complained about the time and manner in which the AFP released her from the ACT City Watch House.

The matter was referred to the AFP and was successfully conciliated through the AFP's workplace resolution process. As a result of this complaint, the AFP made some improvements to its policies for handling people in custody.

Some Ombudsmen abroad have the status of a parliamentary officer, with direct responsibility to the Parliament. In some systems, a complainant can only approach the Ombudsman through their local MP.

MPs in Australia, in discharging their constituency role, perform a function similar to the Ombudsman of taking up the grievances of their constituents directly with government agencies. This is a major function of the electorate offices of many MPs. Even so, many MPs find that the Ombudsman's office can be a useful supplement or alternative to their own constituency work. Sometimes we are better placed because of our resources, experience and information-gathering powers to investigate an issue brought initially to an MP's attention, as illustrated in the *Clarification* case study.

Difficulties for MPs can arise where a constituent has no confidence in the investigation carried

out by an agency. This may arise because the relationship between the agency and the constituent has reached an impasse, or because the constituent holds the agency responsible for some event, particularly in a significant family trauma (as illustrated in the *Verifying events* case study). The Ombudsman's office can independently verify whether or not an agency's actions were carried out properly.

Ombudsman staff have been working to develop the office's relationship with MPs in various ways:

- meeting with MPs and their staff to explain the complaint process followed in our office, and the reasons for decisions reached in particular cases
- regularly distributing information to MPs' parliamentary offices
- visiting MPs' electorate offices as part of our regional and rural outreach program

## CASE STUDY clarification

A Member of Parliament complained about the ATO's imposition of general interest charge (GIC) on a constituent who had previously been led to believe by ATO staff that no such charge would apply.

One day after Ombudsman staff inquired about this complaint, the ATO had contacted the constituent, clarified the situation, apologised for any inconvenience, and arranged to have the GIC remitted. The ATO then undertook subsequent follow-up action to confirm that the remitted GIC was properly credited to the constituent's bank account.

## CASE STUDY verifying events

A Member of Parliament (MP) had been approached by a constituent who alleged that an agency had improperly altered its records on two occasions. The MP asked the Ombudsman to investigate the allegations.

The first allegation was that an alteration by an agency to its paper records had resulted in a benefit payment not being deposited to the correct bank account of the constituent's relative (Mr C). It was claimed that this incident had contributed to a significant family trauma involving Mr C.

Our investigation found that Mr C, in applying for the benefit, had supplied the bank name and account number to which the benefit was to be paid, but did not know the code number of the bank branch. The agency officer had obtained the number from the branch and entered it on the form. This explained both why the benefit was not paid to the correct account and why there was different handwriting on the form.

The second allegation was that details of Mr C's emotional state had been deleted from the agency's computer records. We were advised by the agency that this could not be done without an annotation being made to the computer record, which had not occurred.

- making submissions to parliamentary committees (the 'Promoting good administration' chapter of this report provides more detail).

## BRIDGING THE INFORMATION GAP

Many complaints and inquiries to the Ombudsman's office stem from the confusion or misunderstanding that people have about a particular decision or government program that affects them. In many instances a person will be satisfied with an explanation for a decision or program, without wanting to take the issue further. It is easier to accept an adverse result if it is known why it happened.

The Ombudsman's office plays an important role in providing this explanation to people. Being one step removed from a dispute, we are frequently able to explain things differently and in a way that a complainant can understand and accept. The experience we have accumulated in dealing with similar questions raised by other complainants can be valuable. Over time, the office develops some insight on common areas of confusion and misunderstanding that people experience in their

dealings with government. The *Explanation* case study provides an example.

The Ombudsman's office can also play a role in stimulating a more systemic change to the way that agencies provide advice and information to the public. From the experience of handling individual complaints, we can often point to aspects of an agency's letters, pamphlets and other communication material that is in need of revision and better explanation, as in the *Revised forms* case study.

## PROVIDING REASONS

It is a fundamental principle of good public administration that reasons for an administrative decision should be provided to anyone aggrieved by the decision. Members of the public are more likely to have confidence in how and why government decisions are made if a satisfactory written explanation is provided. In a publication of the Administrative Review Council, *Commentary on the Practical Guidelines for Preparing Statements of Reasons* (2002), the Council set out fundamental interests that are advanced by reasoned decision

### CASE STUDY explanation

Mrs A had purchased some land and complained to the Ombudsman about the delayed development of the site, which was subject to an environmental investigation by an Australian Government agency. Mrs A had raised her concerns with a number of people, including the developer and her local MP, but could not get a clear explanation of what was happening.

Following some quick inquiries, we were able to explain to Mrs A the process used by the agency to conduct an environmental impact study of the site and advised that this could often be a lengthy process. Mrs A thanked us for the advice and decided that she would pursue the matter again with the developer.

### CASE STUDY revised forms

Ms H contacted our office claiming that an Australian Customs Service assessment form was ambiguous, particularly relating to the question of who was responsible for advising Australia Post to hold on to an item where the duty was not paid as a result of a dispute.

Following our inquiry, Customs acknowledged Ms H's concern. To reduce the possibility of a similar problem arising, Customs decided to revise the form to clarify where the responsibility lay, and to provide more specific information about the responsibility for payment of duty where an assessment form is queried.

making, among them, to improve the quality of decision making and to institute transparency in decision making. Providing clear and concise reasons for decisions is an essential part of the system of governmental accountability.

Many public-sector bodies have made an agency commitment to reasoned decision making, to supplement whatever legal obligations may apply. One such example is the Taxpayers' Charter, which provides an undertaking that the ATO will provide a clear explanation of decisions except in very limited circumstances (for example, if explaining a decision would involve a breach of another person's privacy). This ATO commitment reflects best practice that is now widely adopted by other government agencies.

The Ombudsman Act reflects the same theme. Section 15(1)(c)(ii) of the Act provides that the Ombudsman can form an opinion that a person should have been furnished with reasons for a decision about exercising, or refusing to exercise, a discretionary power in a particular matter.

Many of the complaints received by the Ombudsman's office each year relate to instances where there was scope for better explanation of decisions by agencies, as illustrated in the *Providing a statement of reasons* and *Declined*

*Act of Grace payment* case studies. In fact, the most common remedy for complaints investigated in 2003–04 was the provision of a detailed explanation by an agency of its decision or action.

## PROVIDING AN INDEPENDENT ASSESSMENT

An essential component of the Ombudsman's commitment to the values of independence, impartiality and professionalism is that the office should listen to both sides of a complaint or disagreement. The first step ordinarily taken after a complaint is received is to elicit an agency's response to what a complainant has said, and then to give the complainant a further opportunity to comment. Sometimes the Ombudsman's office is the only body that has been independent of the dispute and has heard both sides. The office is not an advocate for either party.

Maintaining independence and objectivity can be important to the professional resolution of disputes. If complainants can trust that those values have been respected, they are more likely to accept the Ombudsman's explanation for an adverse government decision. Conversely, agencies are more likely to accept our viewpoint on an issue

### CASE STUDY providing a statement of reasons

Ms C complained about a refusal by the Tax Agents' Board of New South Wales to provide reasons for its decision not to pursue a complaint made to it about the conduct of a tax agent.

After investigation, the Ombudsman accepted that the Board was not in breach of any legal obligation in declining to provide a statement of reasons. However, on other grounds the Ombudsman disagreed with the Board's approach of not providing reasons. It was pointed out to the Board that it is now widely accepted in the public sector that a decision maker should at least attempt to give an explanation that will satisfy a complainant.

While accepting that the Board has very limited resources and works under considerable time and workload pressure, the Ombudsman considered that it was incumbent on the Board to recognise the importance of reasoned decision making in its dealings with members of the public and to be prepared to provide a sensible explanation of its decision-making process on request. What will suffice as an explanation may vary markedly according to the circumstances of the particular case, including the nature of the decision being made.

In the course of the investigation, the Board prepared a draft letter to the complainant that, in the Ombudsman's view, contained adequate reasons. The Board confirmed that the letter had been sent and that it has changed its policy. The Board now provides all complainants with a general explanation of its processes and, where applicable, specifies reasons on request.

and to acknowledge that a dispute needs to be seen in a different light. The *Adequate action* case study provides an example.

Independent assessment of complaints is also the basis of our work within the police jurisdiction, as the *Aware of obligations* case study demonstrates.

## **FACILITATING COMPENSATION FOR FINANCIAL LOSS**

It is not necessary for a person to resort to legal action to obtain compensation for loss suffered as a result of defective administration by a government agency. A discretionary payment

### **CASE STUDY** declined act of grace payment

Mr R made a claim for an Act of Grace payment against the Commonwealth Director of Public Prosecutions (DPP). The claim was rejected by the Parliamentary Secretary to the Minister for Finance, who set out his reasons in a letter addressed to the Attorney-General as the Minister responsible for the DPP. The DPP declined to provide a copy of the Parliamentary Secretary's reasons to Mr R, considering that it was not their letter to release.

The Ombudsman took the matter up with the Department of Finance and Administration, pointing out that other agencies provided Act of Grace claimants with the reasons for rejection of an application. Often this was done by attaching a copy of the Parliamentary Secretary's reasons to the letter sent by the department or agency to the applicant.

The Department confirmed that reasons should be provided irrespective of whether the decision not to approve a payment was conveyed via ministerial correspondence. The Finance Secretary also advised that the Department would issue a general circular to departments and agencies advising that reasons for Act of Grace payments should be provided to claimants. Applying that practice, the DPP provided the reasons to Mr R in this case.

### **CASE STUDY** adequate action

Mr A complained that the ATO had not taken adequate action to recover unpaid superannuation contributions from his previous employer.

The relevant legislation prevents the ATO from disclosing to an employee the particulars of any action that the ATO has taken, although the ATO is authorised to provide information to the Ombudsman. It is inappropriate for us to pass on information that is otherwise protected; however, we do seek to satisfy ourselves that action by the ATO is consistent with its guidelines and processes.

In this case, we were able to assure Mr P that, although he had not yet seen any results, we were satisfied that the ATO was taking appropriate action.

### **CASE STUDY** aware of obligations

Mr J complained about the conduct of AFP members during a raid on his client's home under the new counter-terrorism laws.

The matter was referred to AFP Internal Investigations. The AFP report concluded that the complaints about the AFP's conduct of the raid and the search and seizure of documents and property were unsubstantiated.

Our own review of the report confirmed that the AFP members were sensitive in their use of the new powers and alert to their obligations. We provided a detailed explanation to Mr J, who has not raised any further concerns.

of compensation can be made under one of two administrative schemes: as an Act of Grace payment by the Minister for Finance and Administration (or a delegate), under s 33 of the *Financial Management and Accountability Act 1997*; or by an agency under the government-approved scheme for Compensation for Detriment Caused by Defective Administration (CDDA).

The purpose of the CDDA scheme is to provide agencies with a discretionary authority to compensate where there is no legal entitlement but where a claimant has suffered loss as a result of an agency's defective administration. Although the Department of Finance and Administration (DOFA) is responsible for CDDA policy and guidelines, each agency is responsible for administering the CDDA guidelines in relation to claims against the agency.

The Ombudsman's office has taken a close interest in the development and administration of these compensatory schemes. The office issued a major report on the topic in 1999—*To compensate or not to compensate: own motion investigation of Commonwealth arrangements for providing financial redress for maladministration*. The CDDA scheme explicitly recognises the Ombudsman's role, in clause 21 of the CDDA guidelines issued by DOFA:

Where the circumstances of a case do not clearly fall within the exact criteria for defective administration, but the agency concerned agrees with the Ombudsman that detriment has occurred as a result of defective administration and the agency is inclined to compensate a claimant, a recommendation by the Ombudsman supporting compensation is sufficient basis for payment.

## CASE STUDY incomplete advice

Mr Q, a Finnish national, made inquiries with two Department of Foreign Affairs and Trade (DFAT) officials about how to send his personal effects, including a van, from Finland to Australia. One DFAT official based in Australia advised Mr Q to contact the Australian Customs Service (ACS) and to access the ACS website. Another official, based in Helsinki, arranged for certain ACS documentation to be sent to Mr Q.

Mr Q subsequently shipped his van to Australia. When he sought to have it released by the ACS he was advised that he needed a vehicle import approval from the Department of Transport and Regional Services (DOTARS). Mr Q applied for this approval, but was refused on the grounds that his vehicle did not meet the relevant vehicle standards. This resulted in Mr Q shipping the van back to Finland. Mr Q complained about DFAT's advice in relation to Australian compliance requirements for the van.

After inquiries, our investigation concluded that it was DFAT policy to provide people inquiring about vehicle importation with certain standard referral information to DOTARS. We found that DFAT's advice to Mr Q, including referral to the ACS website, was insufficient. DFAT accepted there was some scope for a misunderstanding to occur based on the advice, and offered Mr Q \$7,500 in compensation for his losses.

## CASE STUDY processing a claim

Mr N complained about delay by the Australian Taxation Office (ATO) in processing his compensation claim.

Although the ATO had already formed the view that the compensation claim be rejected, our investigation identified a number of areas of possible agency error or deficiency. We also formed the view that it would be difficult for the claimant to establish his original claim of financial detriment.

In response to our inquiries, the ATO recognised that the matter had not been handled as well as it might have been and undertook to negotiate with the claimant on the basis of a fair and reasonable settlement of the claim.

The criteria and procedures for payment of compensation are now clearly spelt out in the CDDA guidelines, and the role of the Ombudsman's office will shift from the routine operation of the scheme. We continue to play a strategic role, and each year either investigate complaints about the refusal of compensation or suggest to agencies that compensation should be paid as a suitable remedy for administrative error detected by the Ombudsman. The role that we can play is illustrated by the *Incomplete advice* and *Processing a claim* case studies.

## OVERSIGHTING AGENCY INVESTIGATIONS

Some of the complaints made each year to the Ombudsman raise issues that can only be investigated thoroughly by a major investigation or by drawing on specialist investigation skills. In the mid-1990s, the Ombudsman established a separate section in the office to conduct major investigations. Some of those investigations were initiated by the Ombudsman's office itself, usually into aspects of government administrative practice, while others were in response to specific complaints to the office.

It became apparent that the Ombudsman's major investigations section could not provide the resources or range of specialist skills needed

for all the work it was called on to do. A decision was made in 2002–03 to disband the section and reallocate its resources to the specialist teams across the office. The office has been exploring alternative ways of meeting the challenge posed by major and specialist investigations.

One approach is to play a role with other agencies in conducting a major investigation. Two examples are given in the case studies *Joint investigation of police complaint* and *Managing major incidents*. In one we conducted an investigation jointly with staff from an agency; in the other we played more of a consultative role in relation to an investigation by a specialist consultant employed by an agency. In other instances during 2003–04, we pointed out to an agency that a matter warranted thorough investigation in a specialist manner, and called on the agency to advise whether it proposed to take action, failing which the Ombudsman's office would consider doing so. To that extent, the office has variously prompted, facilitated or oversighted investigations, without fully conducting the investigation itself.

Our recent experience is that there can be clear advantages in this flexible approach, which can be adapted to the circumstances of a particular issue. Investigations tend to be conducted more efficiently and promptly than the office could itself

## CASE STUDY joint investigation of police complaint

Mr G complained of being assaulted by a member of the AFP. He had also told various acquaintances that he feared that the Australian Protective Service or the AFP might murder him to cover up corruption that he alleged existed in those organisations. Mr G was subsequently found deceased in his residence in NSW. The death was investigated by the NSW Police Service under the direction of the NSW Coroner's office.

Because of the serious nature of Mr G's complaints, the Ombudsman decided to investigate. Terms of reference were agreed for a joint AFP/Ombudsman investigation. Two sworn AFP officers, with experience in investigating serious crimes, worked with an investigator from the Ombudsman's Law Enforcement Team as special investigators under s 46(1)(e) and s 47(2) of the Complaints Act.

The joint investigation was effective in gathering information from witnesses who were reluctant to talk with the police. The AFP members brought considerable experience in interviewing witnesses, serious crime investigation methodologies, operational planning and correct handling of physical evidence. The Ombudsman's office contributed experience in the collection and analysis of documentary evidence and major report writing, and brought an independent perspective to the investigation.

manage while handling tens of thousands of other complaints, inquiries and approaches each year. This approach is also less resource intensive for the office, and enables Ombudsman staff to access the specialist investigation skills and knowledge that some agencies either have or can employ.

There are, on the other hand, certain risks to be borne in mind. The special role of the Ombudsman is to bring an external, independent and objective eye to the investigation of complaints against government. If we are partly relying on an agency to conduct or to facilitate an investigation, we need

to reassure complainants and the public generally that those values have not been sacrificed. Difficult questions to do with the disclosure of the findings of an investigation can arise as well. Depending on the arrangements with the agency concerned, it may not be within the discretion of the Ombudsman to release publicly the investigation report—although we are committed to ensuring that complainants are properly informed of the results of an investigation. There must also be a readiness on the part of the Ombudsman's office to conduct a further review of its own, should this be required.

## **CASE STUDY** managing major incidents

In December 2003, we received a number of complaints about the management of a major incident at the Port Hedland Immigration Detention Facility.

Following our initial inquiries about the use of force (and other issues), the Department of Immigration and Multicultural and Indigenous Affairs appointed an independent investigator with considerable experience in such matters to investigate the complaints. We suggested a number of changes to the draft terms of reference for the investigation, which were accepted by the Department. We met with and provided input to the consultant on the issues to be addressed, and generally monitored the course of the investigation.

The consultant prepared a report that in our view was a thorough and fair analysis of the issues, with appropriate recommendations for remedial action. The recommendations were accepted in full by the Department. Overall, our view was that the investigation was quick and effective.

# tax team

While the Ombudsman's office has always had jurisdiction over the Australian Taxation Office (ATO), the Joint Committee of Public Accounts recommended in 1993 that the Ombudsman's office be given sufficient resources to investigate tax complaints more adequately. The Committee's recommendation stemmed from its conclusion that a fundamental imbalance existed between the powers of the ATO and the rights of taxpayers. Accordingly, the Ombudsman may now call himself the 'Taxation Ombudsman' when performing his functions in relation to the ATO. Since mid-1995, when the specialist Tax Team commenced operation, the Ombudsman has received over 20,000 taxation complaints.

The Tax Team is supervised by the Special Tax Adviser, and comprises five officers and a part-time consultant. Other Ombudsman staff, located in offices throughout Australia, also provide assistance by investigating less complex complaints and by acting as referral points. The Tax Team provides advice and support to those staff members, as well

as handling around half of all tax complaints received. The Ombudsman is the only external complaint-handling agency for taxpayers with complaints about the ATO. The Ombudsman also continues to identify systemic remedies arising from individual complaints, and can conduct own motion investigations.

The Tax Team liaises with the office of the Inspector-General of Taxation (IGT), who conducts reviews on aspects of the tax system. To avoid duplication in the work of the Taxation Ombudsman and the IGT, there is regular consultation between the two offices. In developing his work programs, the IGT consults with the Ombudsman and provides an opportunity to comment on reviews. During 2003–04, the Ombudsman made submissions to the IGT in relation to a review of the ATO's remission of the general interest charge for groups of taxpayers in dispute with the ATO, and in relation to a review of ATO's small business debt collection practices.

*Further information in Chapter 5 (pp. 34–37).*

