

Lessons from a public and private divide

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For the purposes of my discussion on this subject today, I will be referring to Ombudsmen who report to the Parliaments and the ACT Assembly as "Government" Ombudsmen and to the others, as private sector Ombudsmen.

At first glance, it appears that the role of a private sector Ombudsman might diverge quite significantly from the role of a Government Ombudsman. It is, I think, sometimes assumed that there is not as much support and/or guidance for Ombudsmen in the private sector from legislation or other requirements. That assumption is based on the perception of an Ombudsman in the private sector, which might have been the case some years ago, but there have been significant developments since. For example, the Banking Ombudsman was established in 1990 as a "voluntary" scheme for the Australian banking industry, but it has for some time now had reporting and other, in a sense, more significant obligations to the financial services regulator, ASIC.

As an external dispute resolution scheme dealing with financial services disputes, it has been included in the legislative framework for licensing and conduct of financial services providers contained in Chapter 7 of the Corporations Act. Under those provisions, licensed financial services providers must belong to an external dispute resolution scheme approved by ASIC. And as part of its reporting obligations, the Banking and Financial Services Ombudsman reports to ASIC on systemic issues identified and addressed in the disputes considered by the Scheme. As an aside, this systemic issue power – to identify issues that affect a group of customers in addition to those who have complained to a scheme and seek redress for those customers – is, I think, one of the more important aspects of the work of private sector Ombudsmen, achieving as it does wide redress without the need for the bringing of, say, a class action by affected customers.

There have been a number of developments which have drawn the role of a private sector Ombudsman much closer to that of a Government Ombudsman over the ensuing years and that process has been driven by a number of factors, including the growing recognition of the important role that private sector Ombudsmen schemes play in providing cost efficient access to justice for Australian consumers, which has in turn meant a closer interest on the part of Government in supporting the development of such Ombudsmen within a consistent and considered policy framework.

The most significant development was the development and publication of what has come to be known as the "DIST Benchmarks" for industry based customer dispute resolution schemes.

These were developed and took effect in 1997 and were so developed in response to suggestions made by various groups, including the Access to Justice Advisory Committee, which released a report in 1993 suggesting that benchmarks for alternative dispute resolution mechanisms should be developed. The benchmarks, which were developed in consultation with EDR schemes, consumer groups, Government and regulatory authorities contained five key principles.

1. accessibility;
2. independence;
3. fairness;
4. accountability; and
5. efficiency.

I want to spend a few minutes on those benchmarks and illustrate how they are relevant to what we are discussing today and how three of the benchmarks in particular illustrate how in fact there is little divergence between the public and private sector Ombudsman schemes.

Especially in relation to the schemes of which I have the greatest knowledge, namely those operating in the financial services area, the benchmarks have become important to consumers as a significant aspect of consumer rights protection.

As mentioned above, the first of those benchmarks is that a *"Scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers"*.

As far as awareness and promotion is concerned, the Banking Ombudsman, of which I have of course intimate knowledge, promotes its operations via its website, written publications and newsletters, presentations to community groups, advertisements, media releases, media appearances and articles. Most importantly, and like public sector agencies, industry members of all private dispute resolution mechanisms are required to inform their customers about a Scheme providing services in relation to disputes in that industry as part of internal dispute resolution processes, which those members must have in place.

In addition, the Banking and Financial Services Ombudsman, and all private Ombudsman schemes have available brochures in a variety of languages; provide interpreting services and also assistance to consumers who have difficulty putting complaints in writing. There is also a high level of awareness of, for example, the Banking and Financial Services Ombudsman Scheme amongst Members of Parliament and disputes are often referred to us by a disputant's Local Member to whom the complaint has been initially directed.

All the schemes accept complaints made by a representative of a consumer (with appropriate authority). The processes are relatively easy to use and the services are free to consumers and small businesses.

All the schemes have in place staff training and development programs and endeavour to adopt processes and procedures which are relatively non-adversarial, given that the processes are inquisitorial, informal and use techniques and procedures such as negotiated settlements, mediation and conciliation conferences but discourage the use of legal representation. Access is by telephone call, letter or by filling in a dispute form online.

There is no need to identify the exact *"wrong"*; if we need more information to understand the nature of the dispute, we will ask for it.

So, as far as accessibility is concerned, I think that the approaches taken by the private Ombudsmen to the services provided are, if not identical, very close to the processes in the public sector.

Where at times, the private sector schemes might be seen to diverge from the public sector schemes, is in the area of "*independence*". The fact of the matter is that the schemes with which I am most familiar, all gather their budgets from members using a variety of methods to calculate the contribution made by those members to the overall budget of the Scheme.

A number of structural and procedural factors operate to ensure that the Ombudsman and his or her staff are able to make independent decisions and are supported in maintaining independence:

- The Ombudsman is accountable only to the Board only for matters relevant to the administration of the Scheme and not in relation to decision-making;
- He/she and the staff of the Scheme are entirely responsible for the determination of complaints and the Ombudsman ensures that no conflict of interest arises;
- The Board of the Scheme, consists of equal numbers of consumer and industry directors, with an independent Chairperson; and
- Decisions about changes to the Terms of Reference or rules of a scheme are the subject of consultation with Government, industry and consumer representatives.

Because the structure is a corporation, however, the membership of the Scheme theoretically has ultimate control of the destiny of the corporate entity through which the Scheme is operated. Even though the Board of the Scheme is evenly balanced between consumer and industry representatives, the membership, in the ultimate analysis, could "control" the entity by, at least in some cases, controlling the make up of the Board and its Chairman or having a power of veto over the content of the rules or Terms of Reference of the Scheme.

In practice, such a grab for control would hit a number of obstacles, including the never to be underestimated public and Government relations aspects and, in the case of all the schemes operating in this country in the private sector to date, none to my knowledge have encountered what could be described as a shareholder revolt in relation to the activities of a scheme. But there is always that potential and it is this reality is that independence is ensured.

I should add, however, that the situation may well be somewhat different for the Energy & Water Ombudsmen in Australia, which have been created at least in part in Statute in various States and could well fall into a different category from those operating in the financial services and, possibly, to the communications areas.

Issues around funding for schemes and the content of the jurisdictional limits, rules or Terms of Reference of the schemes, are very much in the control of the Directors of the schemes and accordingly could not be said, except in extreme circumstances, to be capable of being influenced in an adverse way by the shareholders in the organisation.

The third of the benchmarks, which I wanted to talk about briefly is the requirement of fairness. This requirement is described in the benchmarks as follows:

"The Scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based."

I am sure that all public Ombudsmen have a very clear idea on that which is fair given that a lot of their investigation of the activities of public sector agencies subject to their jurisdiction arises from allegations of acting unfairly levelled against those agencies by the residents of the State or Territory who make complaints.

The understanding of what constitutes procedural fairness has always been a priority for those leading the private Ombudsman schemes. I am aware that a deal of effort is put into ensuring that a scheme's staff has a very clear understanding of that concept. In the case of the BFSO, we have developed a training presentation on the principles and practice of procedural fairness, which has been given, at their request, to staff of other schemes such as FICS and EWOV, and has also been requested, in written form, by Financial Services Ombudsmen in places like South Africa and Trinidad and Tobago, so it seems to be generally applicable and I am sure the content would be familiar territory for public sector Ombudsmen as well.

And although it happens rarely, decisions of private sector schemes are, of course, subject to judicial review, whether or not they are classified as administrative decisions.

An Ombudsman, whether in the private or public sectors, must be provided with, by those in respect of whom complaints have been made, all the information relevant to any complaint.

Guidelines are usually provided on how and what information must be provided to an Ombudsman as part of an investigation process, once again in both the public and the private sectors, so that the Ombudsman can reassure a complainant that all issues which could be relevant to a dispute or investigation have been addressed by that Ombudsman where a dispute has not otherwise been resolved. In other words, there has been a thorough investigation of a dispute not resolved with an investigation conducted to an extent which normally satisfies a complainant. In my view, unless information is provided to facilitate a full investigation, the Scheme could not be said to be satisfying the "fairness" benchmark.

I am pleased that private Ombudsman schemes have been able to get the co-operation of their members in this regard.

It would seem, based on the knowledge that I have of the operations of both public and private sector schemes, that there is little divergence between the approach taken by a public sector and private sector Ombudsman in relation to "*access to information*" enabling a thorough investigation.

The other benchmarks to which I could refer, would be the requirement that the Scheme publicly accounts for its operations, including publishing Determinations and information about complaints, is effective in that it has a broad jurisdiction to cover most activities which it should be investigating and is efficient in that it keeps track of complaints, ensuring they are dealt with appropriately, and also regularly reviews its performance. All familiar to public sector Ombudsmen I would think.

There is, however, one significant divergence between the public and the private sectors. That is in relation to the binding nature of Determinations made by the Australian private Ombudsmen.

Members of a private sector Ombudsman scheme agree, through the membership contract, to be bound by a Determination. Disputants on the other hand are not bound, and may simply reject the decision and take the matter to a Court or Tribunal.

My experience of dealing with complaints is that this is an exceptionally valuable attribute, which we have and very much appreciated by those who use our services. Even though I, as the Banking and Financial Services Ombudsman, have never had to use my determinative powers (which involve the right to make a binding Determination against a member in relation to an amount of up to \$280,000), the mere fact that this power is available means that the responsiveness of our members is, overall, good.

We have also, from time to time and in accordance with an obligation to be "efficient", reviewed our processes and procedures on a regular basis. One of the key findings of those reviews has been that consumers want a "Finding" in relation to their dispute and, hopefully, a Finding, which discloses some monetary payment in favour of the complainant. This we discovered when we reviewed our procedures, which included a level in our office known as "Initial View". The comments that we regularly received from those who used our services were to the effect that ". . . *we are not especially interested in what your initial view might be about our case; we want to know what you really think*".

Therefore, even though the Ombudsman of the BFSO has not had to use his determinative powers over the last eleven and a half years, Case Managers in the office in making Findings are also satisfying a need in the community for, at times, some closure in relation to a matter, which they have found traumatic. The community, I think, appreciates the fact that in the ultimate analysis the Ombudsman has the power to bind a financial services provider, which must comply with his view on a case.

In summary, therefore, it seems to me that there is little divergence between the role of an Ombudsman in the public and private sectors, although I acknowledge that an argument can be made on the independence of an organisation where ultimately the members as shareholders in an entity would have certain powers.

Both public and private sector Ombudsmen perform roles which are important to consumer rights in Australia; many consumer advocates have said over the years now that the schemes, as they have developed, are one of the success stories in the context of consumer rights in Australia. And we expect that as the schemes continue to develop, that important role will become even more important.