

## **THE AUSTRALIAN COMMONWEALTH OMBUDSMAN: STATE OF THE INSTITUTION**

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### **The institution as it exists in Australia**

According to the Concise Oxford Dictionary an Ombudsman is an 'official appointed to investigate individuals' complaints against public authorities.

Among ombudsmen, there is endless debate about just what essential features of power or purpose distinguish the 'classical' ombudsman from a number of other ombudsman-like institutions; but for all practical purposes the dictionary definition is clear enough, and adequately identifies among other officials with review and investigatory powers the features of the ombudsman institution as it exists throughout Australia.

This paper concentrates on describing what I can, cannot, will or should do as Commonwealth Ombudsman, that is, as holder of the statutory appointment of Ombudsman under the *Ombudsman Act 1976 (Cwth)*. Differences of larger or smaller degree exist between my functions, jurisdiction and powers and those of Ombudsmen in each of the Australian States; space does not permit an examination of those differences. Since defence is, under the Australian Constitution, a matter for the Commonwealth (Federal) Government, no State Ombudsman can duplicate my addition role as Defence Force Ombudsman. Nor has any other Australian Ombudsman (at this stage) exactly parallel functions in relation to police complaints or arising from freedom of information legislation. But we all share some essential attributes:

- receipt and investigation of complains about official administrative actions
- the power to compel the giving of information during investigations, to require witnesses to appear and to take evidence under oath
- we do not hear argument as from parties during investigation
- we are not subject to any external direction, political or otherwise in the conduct of an investigation
- we may form what conclusions we wish by reference to a wide range of attributes of 'defective administration' or 'maladministration' (the latter being a term until last year better avoided in my own jurisdiction); but

- our powers of redress are, in the final analysis, recommendatory rather than compulsory - we cannot substitute our own judgments for those of authorities we investigate, and we rely upon the quality of our work and if necessary persuasion to ensure that our recommendations are accepted
- in the final result if we remain dissatisfied about the implementation of our recommendations we may make a report to Parliament.

Unlike other Australian Ombudsmen, whose jurisdictions have geographical as well as conceptual boundaries within the country (theirs stop at state borders), my jurisdiction runs nationally, thus geographically (though not legally) overlapping each of theirs.

## **Historical background**

Western Australia became in 1971 the first state to legislate for appointment of an ombudsman. South Australia followed in 1972, Victoria in 1973, Queensland in 1974, New South Wales in 1975, the Commonwealth in 1976, the Northern Territory in 1977, Tasmania in 1979.

In the Commonwealth jurisdiction, apart from the Ombudsman, there are three Deputy Commonwealth Ombudsmen who hold statutory office. One is specifically designated Deputy Ombudsman (Defence Force) and another also the Deputy Ombudsman for freedom of information matters. The present Deputy Ombudsmen are Messrs C.T. Hunt, J.C.Jordan and A.G.Kerr.

Each statutory appointment is for a fixed period not exceeding seven years. Appointments are renewable.

## **Complaints to the Commonwealth Ombudsman vs other review avenues**

Australians having problems with what they see as 'the bureaucracy' may find themselves confused about choosing an avenue of administrative review among rather a profusion around the country.

Firstly, since Australia has a three-level system of government—national, State or Territory, and local, each with its own administrative machinery, the aggrieved can be understandably perplexed about whether the problem at hand concerns Commonwealth, State or local administration. Sometimes more than one is involved. For example, public schooling is provided by State Governments; but the Commonwealth provides funding for non-government schools. My office thus inevitably receives many complaints about actions of State or local authorities which it must re-direct to the relevant State or Territory Ombudsman.

Second, all three 'tiers' of government administration abound in avenues of internal review, channels of appeal, and tribunals of all sorts - in addition to traditional resource to the Courts. This is no place for a guide to the maze of Australian official review mechanisms. My staff therefore needs to keep abreast of the constant developments in administrative review, and to be able, at need, accurately to guide complainants to other avenues of review where those may be better attuned to the presenting problem

Within the Commonwealth administration itself there is a complex 'package' of review machinery, whose existence is the foundation of many of the discretions conferred upon the Ombudsman, by reference to which my staff needs to decide which of the

complaints we receive we should take up, and which decline. I examine these in a later section of this paper.

The main elements of Australian Commonwealth administrative review are:

- *Internal review*—many Commonwealth Acts provide that persons dissatisfied with decisions or actions they authorise may seek review by more senior officials within specified agencies, or by government ministers, or by informal review bodies set up by Ministers or Departments. Some such review bodies recommend to Ministers where they disagree with original official decisions; few have the power themselves to upset decisions or to undertaken formal enquiry or to compel the giving of information. Examples are:
  - Immigration Review Panels—which review a wide range of migration decisions and recommend to the Minister for Immigration and Ethnic Affairs
  - Social Security Appeals Tribunals—which look into decisions on a wide range of social welfare benefits, and recommend to the Department of Social Security
  - Nursing Homes Fees Review Committees of Enquiry— which recommend to the Minister for Health when owners of nursing homes are dissatisfied with departmental decisions about the maximum fees they may charge

Not all of these are set up under legislation: some have existence only by administrative fiat.

- *Administrative Appeals Tribunal*—this was set up by Act of the Commonwealth Parliament in 1975; it review only those decisions that are specifically within its power by virtue of enactments; it hears arguments as from parties; is empowered to inform itself as it thinks fit; and may set aside official decisions and substitute what orders it thinks fit
- *Review by the Federal Court of Australia under the Administrative Decisions (Judicial Review) Act 1977*—under this Act the Court, exercising its standard jurisdiction, may examine for legal propriety any decision made under an enactment. Although the Court cannot make fresh decisions on the merits it may make orders declaring the rights of the parties and it may also remit to officials those decisions it finds to have been unlawfully made accompanied by directions for further handling
- *Freedom of Information Act 1982*—although not strictly an avenue of review, is generally counted among the ‘administrative review package’, and is of direct relevance to my own office, as explained later. The Act creates a legally enforceable right of access by the public to official documents, subject to a number of specified exemption provisions.

Most Australian Ombudsmen have wide discretions not to investigate where a grievance is better taken to a Court, tribunal, or internal review mechanism, unless there is good reason, in the circumstances at hand, to make an exception. Those available to me are listed in the next section.

The pressure under which my staff and I operate is such that we are firm in exercising these discretions. Except in the most unusual circumstances, we will not investigate a complaint from a large commercial undertaking alleging tortious action by the Commonwealth. That is what the Courts are for. I am much more inclined,

however, to act for a complainant of advanced age or limited means, who alleges such a wrong.

Similarly, we keep out of matters that are under consideration by Ministers following representations by Members of Parliament. Ministers may overrule bureaucratic decisions; I may only recommend; while delays and waste can attend duplicated attempts to right an alleged wrong. Nor will I readily step in when a tribunal such as the Administrative Appeals Tribunal, before which legal representation is unnecessary, can set aside a contested decision. I believe my views here are widely shared among the Australian Ombudsmen.

If this seems a formidable list of things my office will usually not do, consider the enormous range of bureaucratic actions and decisions not reviewable by any means except the scrutiny of an Ombudsman.

Consider, also, that the services of the Ombudsman are free to all. Complainants concerned about legal costs, such as pensioners, the unemployed, or, for that matter, the ordinary wage earner, may be unlikely to obtain legal aid for any remedial action through the courts - but may well be able easily to provide any information we may require while investigating. I have offices in each State capital city except Tasmania and the Northern Territory where the State and Territory Ombudsmen act for me under delegated powers. We are only too willing to offer initial advice as to our powers and so forth over the telephone, or to help complainants who may be confused - or speak little English - to articulate their complaints.

## **Discretions**

Section 6 of the *Ombudsman Act 1976 (Cwth)* provides the Ombudsman with a range of grounds upon which he may decline to investigate or continue an investigation. These are largely reflected in State legislation. If the complainant became aware of the relevant administrative action more than 12 months before complaining, if the complaint is frivolous or vexatious or not made in good faith, or if the complainant does not have sufficient interest in the subject matter of the complaint the Ombudsman may decide not to pursue the matter.

We have rarely received complaints that we consider frivolous, vexatious, or not made in good faith. A complaint may appear not to raise a serious or substantial issue but to the complainant may be very important. Some, however, lodge their complaints with the intention of avoiding or delaying proper processes such as prosecution action or the recovery of debts. Where this is evident we will not seek to intervene between the agency and the complainant.

There is also a 'catch-all' discretion, which the Ombudsman may use if in his opinion investigation, or further investigation, is 'not warranted having regard to all the circumstances of the case'.

The discretions I most frequently exercise, as listed above, are those dealing with alternative remedies. Where a complainant has exercised a right to have a court or statutory tribunal (such as the AAT) review action which forms the subject matter of the complaint the Ombudsman is not empowered to investigate unless in his opinion special reasons exist to justify doing so. Where the right of review by a court or tribunal exists but has not been exercised the Ombudsman may choose not to investigate if he is of the opinion that it would have been reasonable for the complainant to avail himself of the review.

In considering what constitute 'special circumstances' for the purpose of deciding whether to investigate notwithstanding an existing decision by a court or statutory tribunal, we normally look at the result achieved by, and the nature of, the earlier review. It is insufficient for the complainant simply to claim that he did not get the result he was seeking but it may be, for example, that the Administrative Appeals Tribunal has not been able to take into account defective administrative action that might have led us (and still may) to recommend a remedy.

Where complainants have not used available avenues of review, our concern is to establish whether, as a matter of practicality, the complainant has another remedy available to him. This is usually achieved by examining the end result the complainant seeks and deciding whether it is a realistic objective achievable on appeal to a court or statutory tribunal. If it is, the question arises whether it is reasonable to expect the complainant to exercise the alternative right of review. I am not constrained as to the factors I may take into account but my office will, of course, look at such things as the complainant's circumstances and the cost of litigation in relation to the remedy sought.

### **Jurisdiction**

My powers extend to the investigation of complaints about administrative actions undertaken in any of the Departments of the Commonwealth government such as the Departments of Social Security, Veterans' Affairs, Industry and Commerce and Immigration and Ethnic Affairs. Jurisdiction extends to a host of statutory authorities including Australia Post, Telecom and the Taxation Office. Some such authorities are excluded, notably two government-owned airlines and the Commonwealth Banking Corporation and its associated banks. Similarly State Ombudsmen have jurisdiction over the State government departments and many, though not all, State statutory authorities. All exercise jurisdiction over local government in some form or other.

### ***Actions of Ministers***

I do not have, nor do any of my State counterparts have, jurisdiction to investigate the action of Ministers. The exclusion presumably rests on a theory that under the Westminster system, Ministers are already answerable to Parliament for the actions of their departments and for the time being at least they should not be exposed further beyond the processes of a court. However, my office can investigate advice given to a Minister and if it is found to be defective, an opportunity for remedial action may present itself. Thus, we may ask a department to make a further submission to the Minister based on our findings of fact and so forth and the result may be a change in the Minister's attitude. But an Ombudsman is powerless if the Minister should remain adamant and adhere to his original decision. For the most part my experience has been that Ministers are as sensitive to the work of the Ombudsman as their departments.

### ***The judicial process***

No Ombudsman has jurisdiction over the actions of courts. The Ombudsman in at least one Australian State has been confined by decision of Courts to investigating administrative actions which occur in the executive arm of government as distinct from the legislative and judicial arms. The decision in question which seems to be based on an old separation of powers, appears to prevent the affected Ombudsman from investigating official actions associated with the judicial process, for example, the actions of court registries. This is a view I do not accept we have so far entertained such complains without legal challenge.

## ***Public employment***

A tortuous clause in the Commonwealth *Ombudsman Act* precludes investigation of complaints about terms and conditions of employment in the Australian Public Service and agencies subject to the Ombudsman's authority. It reads that the Ombudsman may not investigate 'action taken in relation to that employment, including action with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration...'.

Although the broad meaning is clear enough, on one reading the exclusion applies only to persons currently employed in the public service. However, the better view is that the section prohibits investigation of complaints about terms and conditions in the service whenever arising. Nevertheless the exclusion does not prevent me from looking into actions taken before or after employment and my office frequently enquires why persons are not offered jobs and it does not hesitate to investigate complaints about post-employment actions as, for example, allegations of delay in giving a former employee his post-employment entitlements.

My view is also that actions taken during employment with respect to superannuation or workers' compensation are within my jurisdiction. The exclusion clause, according to our legal advice, relates to the performance of the duties of an employee and does not embrace actions taken in the course of administering the Commonwealth's superannuation or compensation legislation.

Two years ago, partly in response to ungrounded fears that the Ombudsman was seeking to invade the preserve of the Public Service Board, an interdepartmental committee met to consider whether the exclusion clause I have described could be clarified. The task proved to be beyond all our resources. Recently the government introduced the Merit Protection (Australian Government Employees) Bill into the Parliament establishing a Merit Protection and Review Agency with powers to deal with public service employment-type grievances. As it reads, the Agency's functions will overlap with those of my office but this should not matter. We are only too happy to recognise the role of the proposed Agency.

My view has long been that actions taken during employment with respect to superannuation or compensation matters are within my jurisdiction. This view has been widely accepted so far as it applies to actions taken after employment; but a recent opinion from the Attorney-General's Department has confirmed mine: such actions are within jurisdiction whenever taken.

The Commonwealth's new Merit Protection Agency seems likely to have a jurisdiction that overlaps mine to some extent; there will be a need for it and my office to agree on where the new 'border' lies: I should not like to see either duplication of effort, or complainants 'falling down the cracks'.

## ***Defence Force Ombudsman***

By an amendment to the *Ombudsman Act* last year the Commonwealth Ombudsman is also, ex officio, Defence Force Ombudsman.

In general, the DFO has jurisdiction to investigate actions taken by a Department or prescribed authority where those actions relate to or arise from a person's serving or having served in the Australian Defence Force.

I have always had jurisdiction to investigate complaints by former service personnel about such things as repatriation entitlements. But my jurisdiction as DFO also

extends to actions of the Defence Force toward serving members – for example, postings, discharges and allowances. (This contrasts with my civilian jurisdiction, which, as noted above, in general excludes employment-related matters involving Commonwealth employees).

The DFO cannot investigate actions related to disciplinary proceedings instituted against a member of Defence Force, or actions taken in connection with the grant of honours or awards but otherwise my jurisdiction seems to encompass most matters of concern to service personnel. They are expected first to resort to quite elaborate internal grievance procedures before coming to my office.

## **Remedies**

It is open to most Ombudsmen to recommend any remedy they think fit, and are therefore able to exercise their imaginations broadly in quest of the remedy that fits the crime. I may recommend that a matter be reconsidered on the basis of facts as found by the Ombudsman, or that detailed exposition of official action be given to the complainant. Not infrequently I recommend the payment of compensation where a complainant has suffered financial detriment from misuse of official power. An Australian Court broke ground that was new, in Australian terms, some three years ago, when it held a local government body liable for detriment suffered by a complainant in consequence of his reliance upon advice responsibly but wrongly given (*Shaddock and Associates P/L v. Parramatta City Council* (1981) 36 Australian Law Reports 385). My office, however, had applied the principle enunciated in this case some years before.

Years may pass between an action wrongly depriving a complainant of money (failure to recognise a pension entitlement, or wrongful recovery of an alleged overpayment) and my recommending a remedy. Meanwhile, not only may inflation take its toll, but the complainant may forego other benefits that money could have attracted, by use or investment. My office has not yet found a universally satisfactory means of compensating complainants in these circumstances. I have recommended, on occasion, payment of entitlements at current rather than past rates, adjustment of sums in line with the consumer price index, and payment of interest at the average long-term bond rate during the interim.

None of these seems optimally suited to all cases; my office is now studying whether, like the Courts, we should routinely recommend a standard 'discount', however determined, or whether we should continue to recommend adjustment of the base sum from case to case after consideration of all factors at play. Clearly, simple payment of a money amount years too late is mostly an inadequate remedy.

At the same time, I have been often unimpressed by allegations *ex post facto* of consequential loss that depend upon speculation about how complainants might have used the money had it been paid at the right time. Ombudsman must also be conscious of the need to have their recommendations accepted.

At the other end of the spectrum, a conclusion of defective administration does not always suggest its own remedy.

We may conclude that there has been delay in processing the migrant nomination of an aged parent, but what can be a satisfactory remedy should the parent die before the case is decided? Similarly, while we may conclude that a telephone should not have been tapped, I see no obvious remedy if the tap has been removed before we receive the complaint.

Some Ombudsmen have been curiously reluctant to recommend monetary remedies which, in practice, may have to be made through the official exercise mechanisms for ex gratia payments which exist in the Commonwealth and the States. It can, of course, be no easy task to gouge payments out of a reluctant Treasury or Department of Finance but unlike a judge, an ombudsman cannot rest after making his decisions. He has the further responsibility to use his best endeavours to obtain the kind of relief he considers appropriate to the case. It is not a task which can be left to others.

## **The Ombudsman and Freedom of Information ('FOI')**

Legislation, broadly along the United States model, for the purpose of ensuring governmental accountability through maximum enforceable access by the public to officially held information, is gradually becoming accepted as desirable through the Australian federation. The Commonwealth led the way with the *Freedom of Information Act 1982*; one State has followed suit while others are making moves towards the enactment of such legislation, but the principle is not yet embraced universally throughout the federation.

### ***Investigation of complaints***

Under the Commonwealth *Freedom of Information Act 1982* an FOI applicant to an agency who is dissatisfied with the actions of that agency can complain to the Ombudsman. Most such complaints allege failure to comply with procedures or deadlines set down in the Act; fewer complain about refusal, in full or in part, of the applicant's request. With complaints about delay we try to find out promptly what is causing the holdup, and when a decision can be expected. If the answer is unsatisfactory, investigation proper starts.

Where an agency has refused access to documents sought at the outset we usually expect the applicant first to have sought internal review from the agency – this is available under the FOI Act. (We do look into complaints about delay in internal review decisions).

People dissatisfied with internal review decisions then may either appeal to the AAT or complainst to me. If the AAT is chosen, I must consider any complaint made at the same time to me in the light of the discretions I have already discussed. But if, the disappointed applicant complains first to me, the right of appeal to the AAT is 'frozen' while we investigate.

Complaints about denial of access necessarily involve our considering whether the ground(s) for exemption claimed by the agency were in fact properly available. Importantly, I can call to see the documents in question, using where necessary he coercive provisions of the Ombudsman Act.

FOI complaint investigation necessarily has a focus of legal analysis that is not always present in other investigations.

If we conclude that the applicant's request should have been met, then as with any other complaint, I cannot substitute my own decision for that of the agency, but can recommend that it change its decision, reporting successively, as necessary, to the agency, the Prime Minister, and to both Houses of Parliament. As well, we can consider assistance to the applicant as his advocate before the AAT. See below, is not, however, dependent on a matter first being investigated by the Ombudsman as a complaint.

## **Advocacy role**

Unusually – perhaps uniquely – for an Ombudsman, I am empowered under the *Freedom of Information Act 1982* to represent before the Administrative Appeals Tribunal applicants seeking review of adverse access decisions made by agencies under the Act. This power, contrasting strongly with my otherwise invariable role as the impartial umpire, stemmed from a view taken in 1979 by a committee of the Australian Senate that legal issues important to the proper operation of the proposed FOI law should not go untested before the Tribunal. Yet the Tribunal, unlike a Court, cannot award costs to applicants; and a risk was seen that some applicants might thus be deterred from seeking review by the AAT.

In deciding when to appear for applicants to the Tribunal, I must consider, inter alia:

- the importance of the principle involved in the matter under review
- the likelihood that the proceedings will establish a precedent
- the financial means of the applicant
- the reasonableness of the decision under review.

The last of these is frequently impossible to consider unless the applicant for our assistance has previously complained to me about the decision in question: only if he has done so will we have access to the document denied and therefore be able to form a view (see above).

In the single case so far in which we have given this assistance the applicant had not previously complained, and the agencies in question have declined to provide such access voluntarily. In my view, without prior, privileged access to the documents in question, the value of my office's involvement (in comparison, say, with private representation under legal aid) is diminished.

It should be noted that the advocacy services of my office are not available in 'reverse-FOI' cases – ie where an applicant seeks to prevent disclosure of information about him to third parties.

## **Privacy and confidentiality of investigations**

Since the inception of my office, I had accepted as an article of faith that the Parliament had intended that the Ombudsman's investigations should be held rigidly exempt from the scrutiny of the public, including that of the complainant from case to case. My view had been that a provision of the *Ombudsman Act 1976* requiring the Ombudsman to investigate in private, together with the secrecy provisions of the Act (breach of which attracts a hefty penalty), meant not only that each complainant's affairs were safe from the eyes of the others, but that the deliberative processes of the Ombudsman, like those of the Courts, were protected from the public gaze except to the extent revealed by the Ombudsman himself in explaining to the complainants and authorities why he drew his conclusions.

However, this principle appears to me threatened by the outcome of a recent Federal Court case in which I was the respondent.

The *Freedom of Information Act* provides that access to the documents may be denied where a secrecy provision of another enactment forbids release of information of a specified kind. It had been my view that the provisions of the *Ombudsman Act* to which I have referred met that test. Similarly, the FOI Act protects from release

internal working documents created for the deliberative processes of subject agencies.

I had relied upon these two provisions in deciding that I should deny access to a draft report of an incomplete investigation that had been sought by the complainant in the matter. The Administrative Appeals Tribunal had affirmed my decision in reliance upon the 'secrecy provision' argument; the 'internal working document' argument had not been tested before the Tribunal.

The complainant then began two actions in the Federal Court. First, he appealed from the decision of the Tribunal (such a right exists under the FOI Act); simultaneously he sought review under the *Administrative Decisions (Judicial Review) Act* of my separate reliance upon the 'internal working documents' argument.

If nothing else, he matter has demonstrated the thoroughness of the review channels established under Australian law.

The appeal case has been decided: the Tribunal's decision was set aside; argument on the second action has been heard, but no decision handed down at the date of writing.

Whatever the final outcome, the result of the appeal case has caused me concern: the broad protection from scrutiny that I believe the Parliament intended to confer upon my investigations has been struck down. While other provisions of the *Freedom of Information Act* will, I expect, adequately protect each complainant's private affairs from scrutiny of others, I believe the privacy that covered my office's own activities has been eroded. The extent to which this is so, and the extent to which the nature of the Australian ombudsman institution has therefore been changed, are so far unclear. The experience, however, has been at the very least an interesting object lesson in the vulnerability of institutions established by Parliaments to reconstruction by the courts.

### **Informally investigated reports**

Until recently the Ombudsman had statutory authority to conduct only formal investigations of written complains. My office, had, nevertheless, in practice accepted and dealt with oral (and most written) complaints informally, reserving formal investigation for occasions when we required to see files or have officers appear before us, or when I saw need to proceed to a formal report setting out recommendations for consideration of a subject agency.

Amendments to the *Ombudsman Act* in late 1983 established statutory bases for handling oral complaints and for making preliminary enquiries as to jurisdiction, or before deciding whether to exercise a discretion. The amendment also simplified formal investigation; now all complaints we take up with authorities become true investigations under the Act – although we continue to stress, and practise, informality.

This streamlined procedure is assisting us to handle the growing bulk of complaints – particularly oral ones. Its flexibility assists both agencies and ourselves to conserve resources and keep costs down.

Last year we received 2887 complaints in writing and 10451 complaints orally – plus another 3095 approaches not treated as complaints. With only some 30 investigation

staff the need for my office to achieve the most streamlined possible investigation methods is obvious.

Where we can, we will make preliminary enquiries orally and immediately on receipt of a complaint. We can then advise complainants of the position and, if necessary, take the complaint further.

### **Some frequent heads of complaint**

What people most frequently complain about to an ombudsman becomes significant only by reference to the range of actions undertaken by bodies in his jurisdiction. The three-tier system of government that exists in Australia allocates some responsibilities to the Commonwealth (broadly, those with supra-State application), and others to State and local governments. Unfortunately, changing views of the matters have 'supra-State application' in terms of the Federal Constitution, and voluntary agreements between the various State governments about the sharing of powers, make it futile to attempt any brief but reliable definition of any principle upon which the distinctions rest. A further complicating factor is that in the Australian Capital Territory, where my head office is located, functions that are elsewhere State responsibilities are performed by Commonwealth bodies whose actions are within my jurisdiction. Thus public education, a State responsibility elsewhere, is in the ACT within my jurisdiction; similarly water supply and land zoning – each elsewhere municipal functions.

### ***Telephone services and charges***

Consistently, complaints about telephone services and charges are among the most numerous my office receives each year. The Australian telephone network is operated by a national statutory authority which is within my jurisdiction. Of the 13338 complaints we received in 1982/83, 2416 were about Telecom – 18%. A recurrent cause for complaint is overcharging – and here my office is at somewhat of a disadvantage in reaching confident conclusions. Telephone metering and fault finding equipment is, of course, technologically highly sophisticated, while my staff does not include engineers able to undertake independent tests, or to spot technological shortcomings in the functioning or the use made of such equipment. Within those limitations, however, I think we have made good progress in understanding the ways in which Telecom itself investigates complaints of overcharging, and are able to bring the organisation's efforts in this direction under useful scrutiny. Forty four percent (44%) of the complaints against Telecom we resolved in 1982/83 were resolved substantially or partially in the complainants' favour.

### ***Social security***

A wide range of welfare benefits is available in Australia. Inevitably decisions about eligibility, non-receipt of expected payments, alleged short – and overpayments and their consequences are frequently brought to my office. This is an area of complaint, however, where the discretions described earlier in this paper are frequently exercised – eligibility decisions are subject to review by tribunals, and therefore most complaints alleging simply that an eligibility decision was wrong my office expects to be sorted out elsewhere. Thus we exercised a discretion not to investigate 17% of the social security complaints finalised in 1982/83, compared with an average for all agencies in jurisdiction of 13%.

### ***Australian taxation office***

The Australian Taxation Office collects federal taxes – most notably income tax. Australia over recent years has been the scene of some dramatic attitudinal changes towards tax. From a position a decade ago where ‘beating the tax man’ was a national pastime, and tax evaders regarded among the community as engaged in a quasi-legitimate struggle against a rapacious foe, a gradual realisation of the cost to most citizens of the spectacular successes of a few magistri ludi has led (with the assistance of some tightening of legislation and the abandonment of a heavily literalist tradition in the High Court) to public detestation of the tax evader and vigorous, increasingly successful pursuit of them by the Tax Office.

Of course, this has not meant that the Tax Office itself is any the less the target of complaint to my office, as well as of enthusiastic use of channels of appeal and objection built into Australian tax law.

A great number of complaints about the Taxation Office relate to delays in issuing income tax assessments- almost invariably those involving refunds. We also receive complaints from practitioners unable to finalise deceased estates because of delays with final estate assessment. My office can usually resolve such complaints quickly, but cases involving participation in what the Commissioner considers ‘schemes’ often take longer.

We also receive numerous complaints that the Taxation Office will not allow time to pay tax; and about the imposition of penalty tax for late payment.

We are also investigating whether the Taxation Office should reimburse taxpayers’ expenses incurred in providing information or seeking professional advice which ultimately proves to have been unnecessary. So far, the Commissioner has firmly opposed any such suggestion.

We have, until recently, generally declined to take up complains where the comprehensive statutory avenues of review (through Boards of Review or Courts) had not first been tried. However, I recently told the Commissioner that I have modified this policy because of the excessive, ever-growing delays occurring in these avenues. In future, we shall generally investigate, where the dispute is basically one on the facts, whether or not the taxpayer has requested reference of his objection to a Board of Review.

### ***Tenders/contracts***

Contracts between the Commonwealth and private enterprise, and Commonwealth tendering procedures, give rise to a small but steady stream of complaints to my office. The financial states in such complaints are sometimes considerable. As ever, we must in such complaints determine whether there has been defective administration; and if so recommend what remedy is warranted.

We are slow to intervene where it is open to the parties concerned to resolve their differences through adjudication by an arbitrator, an avenue almost always available in Commonwealth contracts. But arbitration is not usually available where the complaint is about tender specifications or procedures, or about choices among competing tenders.

Complaints regularly include allegations of: inadequate tender specifications, unreasonable refusal to accept or consider tenders, harsh contractual conditions,

unreasonable failure to adhere to tender conditions or follow procedures, or, frequently, failure properly to evaluate tenders.

Where, in my view, administrative defect has caused the complainant to miss a contract that should have been his, I must consider what remedy is warranted. There may in my view have been a tort that a Court would recognise, establishing a clearly measurable liability to the complainant – for instance, there may have been negligent failure to consider a tender. My view, of course, may not be shared by the Commonwealth authority concerned or its legal advisers. It is nevertheless my job to assess the extent of the liability, and to seek its proper discharge.

Alternatively, the agency concerned may adhere to, and we may agree with, legal advice that there is definitely no liability. This need not deter me from recommending the payment of compensation or the making of another remedy, should I take the view that legal liabilities aside, remedy is in order as a matter of plain common sense or moral responsibility.

It may appear incongruous that I should persist with a recommendation to compensate a complainant whose tender was mistakenly passed over where there may be no legal liability because, for instance, the tender document clearly stated that the lowest tender would not necessarily be accepted. I take the view, however, that the Commonwealth, apart from exercising all care in evaluating tenders, must ensure that public money is spent effectively and economically. Those dealing with the Commonwealth have a legitimate expectation that their tenders will be properly considered, and that procurement procedures should be, and be seen to be, beyond reproach. So where error or omissions in the evaluation of tenders cause an otherwise suitable tenderer to be passed over, I will not shrink from my recommendation for remedy, even though the Commonwealth's action may not be susceptible to successful legal challenge.

But I generally recommend in such cases a compensation figure reflecting my expectation that unsuccessful tenderers will have taken reasonable and prompt steps to mitigate any losses they might sustain after unexpectedly losing a contract, even where the loss stemmed from defective administration.

### ***Complaints against police***

Policing in Australia is another area of complex division of responsibilities between the Commonwealth and State governments. While each state has its own police force that performs all the obvious functions within its boundaries, including investigation of breaches of State laws, the Australian Federal Police has a considerable presence in every State performing all police functions on Commonwealth property, and investigating possible breaches of Commonwealth law.

I looked earlier at the Ombudsman investigations of others' investigatory actions, police included. Jurisdiction over the police is a hotly debated issue around the country: readers may recall different approaches taken by the Commonwealth (I have jurisdiction), in Queensland, where a separate Tribunal looks into such complaints, and in NSW, where my colleague Mr Masterman expresses dissatisfaction with his present lack of jurisdiction.

The responsibilities of the Commonwealth Ombudsman are set out in a separate Act, the *Complaints (Australian Federal Police) Act 1981*. The Act requires my office to make a register of all complaints received about police conduct whether made to the Australian Federal Police or my office. Primary responsibility for the investigation of

complaints about police conduct rests with a specially constituted Internal Investigation Division of the Force. The Division reports both to the Commissioner and the Ombudsman. My office is empowered to monitor the progress of an investigation and if, in the ultimate, we remain dissatisfied with the work of the IID we may ourselves undertake an investigation. The jurisdiction is to enquire into complaints about all police conduct whether it may be characterised as administrative or not, and extends to investigation of police practices and procedures.

The Australian Federal Police, beside discharging its national role, functions as the ACT community police force. Consequently, a large proportion of complaints against police is about such 'domestic' matters as rudeness, unfair traffic bookings, failure to act against neighbours, and inadequate investigation of accidents.

Many are relatively minor, but may still highlight problems in practices, procedures or training whose consequences go throughout AFP administration. My office and the AFP's Internal Investigation Division aim for quick, informal resolution of complaints where possible – by reconciliation, for instance, or by relying on informal 'preliminary' investigations where no weighty issue emerges.

This is an area where delays need to be markedly shortened and resources conserved for concentration on the more serious complaints alleging assault, harassment, illegal search, falsification of evidence, or corruption.

### ***Complaints about customs matters***

My office receives complaints both from individuals and Customs agents about the Australian Customs Service (part of the Department of Industry and Commerce). Some few of these, like complaints about police, include allegations of larceny, unreasonable search and seizure, property damage, assault, corruption, harassment and incivility. But most have to do with demands for or payment of duty.

Many turn on subjective judgments about tariff classifications, for example whether a particular item is a 'work of art' or an 'ornament'. Many such complaints are from importers (or their agents) with large investments in the disputed goods which may have been imported in commercial quantity for use in manufacture, or for re-sale. We often decline to investigate tariff classification complaints because the AAT is available.

Concessions available to migrants on their arrival in Australia include 'personal effects' which may be imported free of duty and sales tax. In one case, the question at issue was whether a home-built aeroplane (which arrived in several crates that were otherwise filled with pots and pans, clothing and the like) was part of a migrant's 'personal effects'. In the final analysis, we did not need to form an opinion; Customs voluntarily determined the issue in the complainant's favour shortly after we began our investigation.

We are occasionally confronted with claims of negligent advice along the lines of the principles covered by *L. Shaddock and Associates P/L v Parramatta City Council* (1981) 36ALR 385. The essence of most such allegations is that migrants have sought advice from an Australian post overseas, but were given incorrect advice on which they subsequently relied. Often these allegations cannot be substantiated for lack of evidence. But in one recent case involving the importation of a motor vehicle, we applied a balance of probabilities to test the actions of the migrant and concluded that he had probably been given negligent advice by an Immigration post

overseas. As a result, the Department agreed to waive customs duty which would not have been incurred but for the negligent advice.

## **'Legal' aspects of the Ombudsman's functions**

### ***Actions of Commonwealth Lawyers***

Two examples illustrate the approach we take to such complaints – which often relate to Deputy Crown Solicitors' officers – these being the sources of official professional legal advice to Commonwealth bodies.

- A complainant who had sought AAT review of an authority's decision complained that the DCS officer advising the respondent was also advising the Australian Federal Police in its concurrent investigation of possible breaches by the complainant of the Act administered by that authority.

I thought the DCS was not strictly embroiled in a conflict of interest; but was concerned that the officer's dual role could create an impression of pursuit. I think it preferable that prosecution work and appearances for an AAT respondent should be handled by separate advising officers.

Secondly:

- A complaint alleged that the Crown had prejudiced his case by its conduct of committal proceedings against him.

This raises the question of the Ombudsman's jurisdiction to investigate decisions made in the course of Commonwealth prosecution proceedings. I recognise, but reject, the argument that decisions during the prosecution process may not themselves be 'administrative': the *Ombudsman Act 1976* empowers the Ombudsman to investigate action that 'relates to a matter of administration'. I believe this formulation was adopted to minimise dispute about whether actions are themselves 'administrative'. In a complaint like this there is a continuum of official action culminating in appearance in court. I find it difficult to accept that at any point in that process there is a cessation of any relationship with matters of administration.

In any case, the more important question is one of policy – should the Ombudsman be able to investigate such actions if he thinks fit? Particularly among complaints about police, substantial numbers concern actions related to proceedings, and more yet may flow with a recent increase in prosecution activity by the Commonwealth in areas like fraud by doctors on Australia's 'medicare' system, and tax evasion. I have no doubt that, overall, actions of such kinds 'relate' to matters of administration. To accept an arbitrary cut-off point in the process which would, in effect, prevent review of official actions during such proceedings would be at odds with the policy purposes of both the *Ombudsman Act 1976* and the *Complaints (Australian Federal Police) Act 1981* – particularly given discretions under which the Ombudsman can, where actions are otherwise reviewable, decline to investigate.

### ***Investigation and prosecution complaints***

My jurisdiction over law enforcement investigators is a growth industry. As well as the police, official investigators operate in areas such as customs control, tax, immigration, social security, 'medifraud' and protection of wildlife.

Inquiries and analysis preceding appearances before Courts, together with the implementation of judgements, create a vast administration, over which most

Ombudsmen have limited jurisdiction. I look later at limits to jurisdiction over Courts and quasi-judicial officials; here I discuss pre-Court issues.

- the manner of investigation: alleged incivility, harassment, assault or theft of seized property. These are matters of conduct rather than procedure
- the method of investigation: allegedly improperly drawn warrants to access seized business files, undue delay, breaches of judges' rules
- the quality of the decision to prosecute: unreasonable delay in deciding whether to bring matters to hearing, insufficient attention to discretionary factors or to prosecution policy; or
- the interaction of investigator and complainant: Here issues mix conduct and procedure. For example, investigators' 'deals' with informants; the unrepresented defendant deciding after a 'chat' with investigators to please guilty; the environment in which complainants are invited to attend a police station or to make a statement.

Substantiated complaints may identify a need for new procedures or reform of existing practice. Complaints relating to the manner of investigation may help check 'abuse of power', and remind investigators of the necessity for clear, dispassionate and fair communication with all members of the public, as well as leading to specific recommendations for remedy, or charges of breach of discipline or law. An Ombudsman inquiry may also prompt a change to training or demonstrate the need for an agency to develop policy.

Recent growth of complaints about, and of my powers over, investigatory agencies have necessitated recruitment of specialist staff and extra training for existing staff.

### ***Actions of court and quasi-legal officials***

The *Ombudsman Act 1976* does not authorise the Ombudsman to investigate actions of 'a Justice or Judge of a Court created by the (Commonwealth) Parliament'. But it has been clear *ab initio*, both as policy and by interpretation, that the Ombudsman has jurisdiction over the actions of Court officials. Some of their duties are 'quasi-judicial', while some such officers are subject to the control of a Court.

I take the view that while my office cannot investigate actions taken by Court officials in accordance with a Judge's direction, we can investigate both non-directed actions of a Court Registrar, and actions of Court staff taken under the Registrar's direction – whether the Registrar was acting as an administrative officer of the Court or in a 'judicial' or 'quasi-judicial' role.

This principle applies widely. I thus assert jurisdiction, on parallel reasoning, over actions of the Industrial Registrar and Deputies of the Conciliation and Arbitration Commission, whenever they act administratively. These are officers of that very Australian institution, the 'judicial' system of industrial arbitration and regulation.

A compliant alleged rudeness and indifference in a Family Court Registrar during a compulsory counselling conference. We could not investigate the result of such a conference, but we could criticise the method used by the counsellor. The Family Court is a Federal body that has replaced the matrimonial causes jurisdiction throughout the Australian States.

I have rejected arguments that when the Official Receiver in Bankruptcy acts as a trustee the Ombudsman lacks jurisdiction, and likewise that the Ombudsman lacks

jurisdiction because the Official Receiver has to exercise commercial judgement. I see no inherent conflict between the notion of the Official Receiver as trustee acting in a fiduciary capacity and the similar fiduciary nature of many other official administrative actions.

The Official Receiver – part of the mixed curial and administrative system Australia uses to regulate the affairs of bankrupts and their estates – is subject to the control of, although not an officer of, a Court. This distinction disposes of the notion that the Official Receiver when acting as trustee is carrying out judicial rather than administrative functions. But once the Court has stepped in to exercise control I would not seek to intervene.

Legal aid in Australia is mixed Commonwealth-State responsibility attended by considerable complexities: in some States applications for aid are made directly to a Commonwealth body, the Australian Legal Aid Office.

Complaints about legal aid, while not giving rise to considerations outlined above, are sometimes about professional legal judgements by the ALAO. The criteria for assessing legal aid include the likelihood of success of action for which the aid is sought. I can investigate the issues taken into account by the officer assessing the matter, and reach conclusions about whether the decision taken by that officer is a reasonable one.

### ***Legal parameters of non-‘legal’ complaints***

Complaints made to me must relate to matters of administration. Mostly they are ‘non-legal’ in nature, but often nevertheless legal issues arise during investigation.

While it is not the Ombudsman’s primary function to adjudicate on questions of law, he is specifically empowered to report where actions appear to have been contrary to law or to be based wholly or partly on a mistake of law; and to recommend that a rule of law or provision of an enactment should be altered.

Investigation of complaints often requires some statutory interpretation work in the formation of my view of the legality and reasonableness of an action.

In other cases actions may have been taken in reliance of official legal advice including advice on civil liabilities or the existence of prima facie cases for prosecution. We routinely analyse this advice in preference to accepting it at face value.

Legal analysis must be undertaken in my office on complaints ranging from allegations of breach of contract to the giving of negligent advice, from abuse of discretionary powers to the wrongful arrest of citizens. In short, we must be prepared to cast a legal eye over practically any legal problem that might find its way to a legal practitioner’s office.

### **Ombudsmen in a federal system**

The Ombudsman institution has now entered the fabric of the Australian system throughout the Federation. All States and the Northern Territory have their own Ombudsman or equivalents (in Queensland and Western Australia there are Parliamentary Commissioners for Administrative Investigations – the functions are very similar), and the *Commonwealth Act* has recently been amended to allow joint investigation of complaints against bodies crossing jurisdictional borders, such as

Commonwealth-State task forces. No such joint investigations have yet taken place. Complementary State legislation must first be enacted; but the way is open.

Excellent co-operation, of which my office is the main beneficiary, exists among the Australian Ombudsman fraternity. My office either shares accommodation or is by agreement located right next to those of my confreres in three of the six States.

More significantly, by inter-governmental agreement, the Tasmanian Ombudsman, Mr Woodhouse, and the Northern Territory Ombudsman, Mr Watts, represent me as agents, receiving and investigating, under delegation pursuant to the *Commonwealth Act*, most complaints lodged in those places. While the Northern Territory arrangement is very new, the Tasmanian agency has been going, much to my satisfaction, since 1980.

### **Some successes and failures**

The ideal society requires no ombudsman. So an ombudsman's 'success' should not be measured alone by the proportion of complaints he 'upholds'. Nevertheless, a 'tame cat' ombudsman will betray himself by the small proportion of occasions in which he concludes that bureaucrats have acted defectively – if officials are imperfect like other mortals, an ombudsman should expect that some significant proportion of the complaints made to him will identify real mistakes or failures that need to be put right.

Bearing in mind what I said earlier about those instances where they may have been administrative defect, but no practical remedy can be found, an Ombudsman worth his salt should also be able to show that where he has identified fault he has usually also succeeded not only in recommending remedy, but in having that recommendation accepted.

Last year, my office wound up 5,680 oral and written complaints against bodies within my jurisdiction (excluding police). 3184 (56%) were resolved partially or wholly in favour of complainants, 41.4% in favour of the authority concerned, and the rest were withdrawn or lapsed. Of those resolved wholly or partly in complainants' favour, 1870 (58.7%) resulted in action of some sort being speeded up, 324 (10.1%) resulted in admissions of error and apologies, 340 (10.6%) in complete reversal or significant variation of an official decision, just over 1% in the payment of compensation or other monetary remedy, and 616 (19.3%) in various other remedies.

1982-83 was the first full year of operation of the *Complaints (AFP) Act 1982*; of the 92 investigations completed, 53.1% of those relating to police conduct were wholly or partly substantiated, 37.5% unsubstantiated, and the rest judged incapable of substantiation. On the other hand, only 9.1% of complaints about AFP practices and procedures were substantiated.

Another measure of an ombudsman's success is the speed with which he is able to achieve his results. I take considerable pride in the system of informal and oral enquiry my office has developed: more than two thirds of the complaints we receive come in over the telephone or by personal contact; and these are almost without exception resolved within a week of receipt.

Unfortunately, where a more complex matter requires written approaches to be made, delays set in, both because of slowness by some authorities in answering queries, and because pressure on my staff has resulted in unacceptable delays at times before one my investigators can give written evidence the close analysis it

requires. In the upshot, complainants not infrequently have to wait months to learn the outcome of our investigations.

Recent restructuring of my office, and, I hope, acquisition in the near future of ADP assistance for my staff, I expect soon to have an effect in reducing the backlogs that cause me so much disquiet.

### **The immediate future**

Since the inception of the Commonwealth Ombudsman in July 1977, our jurisdiction has been widened to cover all complaints about Federal Police conduct and by the creation of the Defence Force Ombudsman and, as well, by the various roles accorded my office under the *Freedom of Information Act*. It was recently proposed, in the Commonwealth legislation to create a National Crimes Authority, that the Authority should also be subject to the Ombudsman. However, the Australian Senate declined to enact this provision, apparently accepting a publicly-touted view that not only would major criminals exploit the services of the office, but also that our investigations would so disrupt the work of the Authority as to prevent it doing a sensible job.

Such views reflect a profound ignorance of our working methods, especially in connection with the Australian Federal Police. I have not yet seen any prime example of the intervention of the Ombudsman disrupting any substantial official activity. The view of the Australian Government, like mine, is that external accountability of the National Crimes Authority is needed to allay fears that the Authority could become a sinister challenge to Australian democratic traditions. The Attorney-General, in accepting the ruling of the Senate that I should not have jurisdiction, left no doubt that he regarded the Senate's decision as a matter of concern.

Over the next year or two our primary concern will be to make our own operations more efficient. As part of the exercise, we will seek greater definition of the circumstances in which my office will take up a complaint notwithstanding the existence of alternative remedies of our role in seeking the payment of compensation to complainants following a conclusion of defective administration.

As to jurisdiction, much will depend on whether there are legal challenges to our operations under the provision now in the *Ombudsman Act* for such questions to be determined by the Federal Court. I believe it to be important that our jurisdiction over the Federal Court Registries and other administrative actions which have some relationship to the judicial process should continue because there is an undoubted public interest in gaining improved judicial administration.