

THE ROLE OF THE COMMONWEALTH OMBUDSMAN IN THE 1990s

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I feel a certain affinity with the Australian Institute of Administrative Law, since it appears to have been born, or conceived, on April Fool's Day 1989 and I assumed my office on April Fool's Day 1991. The press publicity which accompanied the announcement of my appointment was preoccupied with the metaphor of Ombudsman as Watchdog – an unattractive metaphor since it connotes 'yapping'. I found it hard to believe that the number plate of the Commonwealth car with which I was issued was YAP.

Interviewed recently on 2BL, I was surprised to perceive that the interviewer, who is a well-known and perceptive commentator on Australian affairs generally, was speaking as if he did not know that there was a Commonwealth Ombudsman, far less what the role was. I detect from correspondence that I have seen in the office, that there certainly is no general understanding that the Ombudsman is an independent observer of government action, and not necessarily an advocate for the point of view taken by the complainant. Many complainants are disappointed what we do not always take their side.

There are changes going on in the Federal bureaucracy which are having some impact on the operation of the ombudsman.

First, a lot of responsibility is being devolved to lower levels of the Public Service which causes more disparities in administration, rather than less. This is accompanied by a process of regionalisation, with exactly the same result. Achieving consistency and reasonableness in government decision-making is made far more difficult.

Secondly, there is the growing trend towards commercialisation, and sometimes privatisation, of government business entities. The business activities of government entities such as SFIT and Medibank, are already in competition with the private sector, yet their activities remain within the purview of the Ombudsman. My predecessors have taken the view that they would not normally involve themselves in complaints about activities which are commercial activities, and it is my intention to continue that view. One of the major sources of complaints has been Telecom, and yet it is now in the process of being commercialised, and acquiring a competitor. The Government will shortly need to make a decision on what is to happen about the

review of Telecom's activities. Since it will effectively continue as a monopoly for some years to come, it seems difficult to see how an ombudsman-type supervision should not be continued.

Thirdly, there is the growing trend towards a commercial approach, of risk management. This philosophy involves concentrating on efficiency and effectiveness of decision-making, getting it right perhaps 95% of the time and taking the risk that the remaining 5% will not matter in some way, and that the risk of making those small mistakes is offset by the gains made by making decisions more quickly. The problem is, who runs the risk? Consistently with the philosophy, it is the decision-maker who runs the risk, not the person who bears the brunt of the decision, and that is where the Ombudsman comes in if government authorities are to take that approach. In this context, I believe that the appropriate metaphor is safety valve, rather than watchdog.

Fourthly, since the Ombudsman's office was established, there has been what cynics might describe as a predictable increase in the number of other review bodies and processes. Apart from the obvious agencies, such as the Merit Protection and Review Agency, the Privacy Commissioner, the Human Rights and Equal Opportunity Commission, and the process called freedom of information, there is a host of other quasi-judicial bodies with review functions, such as the Social Security Appeals Tribunal, the Immigration Review Tribunal, the Student Assistance Review Tribunal, and internal review bodies within the Tax Office and the Immigration Department, in particular. These bodies are much more private in many ways, and their operations may not be as well-known even as the Ombudsman. Frequently, where complaints are being dealt with by those review bodies, the Ombudsman exercises his discretion not to investigate the complaint until there is some resolution of internal process.

There have been some constant features of the office since it was established. I am not sure that they should necessarily remain the same. Two which have continued and are likely to continue, are its informality and flexibility when dealing with complaints. One which requires some attention, however, is the tradition that the Ombudsman has no decision-making power, and can merely recommend or cajole.

The concept of Ombudsman has recently been taken up enthusiastically in the private sector, with a Banking Ombudsman and a proposal, I believe, for an Insurance Ombudsman. Certainly the Banking Ombudsman has, and I believe the Insurance Ombudsman is intended to have, a limited decision-making role as well as the role of investigating complaints. It would certainly be far more efficient, and might serve the bureaucracy processes quite well, if the Ombudsman did have a decision-making role on small complaints where the agency was reluctant to make a decision because of some fear of a precedent or whatever, that the amount of financial compensation involved is so small that it is wasteful of resources for the Ombudsman and the relevant agency to continue to argue for months and possibly years about the appropriate result.

Frequently the Ombudsman is involved in act of grace payments, and the present temporary regime with respect to act of grace payments has as one of its cornerstones a recommendation by the Ombudsman, the existence of which enables a department to make an act of grace payment after notifying the Department of Finance, rather than having to obtain the concurrence of the Department of Finance.

Then there is the availability of the office to all whatever their station in life. I was quite pleased to discover the extent to which law firms and corporations are aware of the office, and use its facilities in appropriate cases. This is frequently linked to

obtaining refunds or act of grace payments in various circumstances relating to different categories of taxation. Nevertheless, if the funding of the office remains as tight as it has been, a way may need to be found of giving priority to those whose resources do not permit them to contemplate any other form of relief. There is a review of the office of Ombudsman, about to be commenced by a Senate Committee, and it will be interesting to see what emerges from the first full review to take place for some years.

Since the main remedy presently available to the Ombudsman is to report, I thought it might be interesting to summarise the position on these reports. There have been only two section 17 reports to the Parliament since the office was established. They were the subject of a Senate Committee Report to the Parliament, but no further action has been taken on them. The other reports are those under section 16, the reports to the Prime Minister.

On 30 June 1990, there were three such cases which had been referred to the Prime Minister, and which remained unresolved. One concerned a delay in correcting an anomaly in Defence Force Retirement Benefits legislation which was submitted in 1986. Despite a mountain of correspondence, no resolution has yet been achieved. The second referred to difficulties arising from the administration of a contract for the completion of hospital renovations, and was submitted in October 1988. It has now been resolved in the sense that no further action will be taken. A third, submitted in 1989, involves the allocation of catches under the Southern Blue-Fin Tuna Management Scheme. The Government does not propose to change its mind there either, and I am considering what to do about that.

The inability to resolve the 1986 report is frustrating, and my predecessor certainly contemplated reporting to the Parliament under section 17 in respect to that matter. A new case has recently been referred to the Prime Minister under section 16. Like one of the two section 17 reports to the Parliament some years ago, this new section 17 matter involves an agency whose decisions are at least to some extent, independent of the government, so that they are not necessarily amenable to ministerial direction. If the agency involved continues to take the same view, then it will also be referred to the Parliament so that the matter at least acquires some notoriety. I am, however, doubtful that it will result in any change of view.