# CONSUMER REMEDIES AND THE BANKING OMBUDSMAN

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Whatever criticisms may be levelled at the Banking Industry Ombudsman Scheme - and there are clearly some, as Professor Everett's well researched paper shows - the scheme seems to be widely supported and I feel that the banking industry should be congratulated for its initiative.

I see the successful establishment and operation of the scheme as a lead for greater use of industry based, and community supported, responses to trading concerns: responses that could well overcome the obstacles inherent in a federal system such as ours to achieving satisfactory state solutions to national problems.

The structure of Professor Everett's paper is to acknowledge the position of the Commonwealth Treasury and Trade Practices Commission as endorsing the scheme, albeit qualified to some extent in respect of the ombudsman's lack of powers of investigation and inability to receive certain confidential information.

She recognises the origins of the scheme in the United Kingdom model and examines the Australian counterpart in the context of recommendations that were made in December, 1988 to improve the UK model. These were, of course, the recommendations of the Review Committee on Banking Services Law, which was chaired by Professor R.B. Jack.

Professor Everett accepts that accessibility and impartiality are integral to the scheme's credibility. She focuses on the impartiality aspect by essentially posing the same three questions that the Jack Committee asked of the UK scheme: Is it fair? Is it seen to be fair? Is it efficient?

The Jack Committee concluded that in certain respects, both in its structure and terms of reference, the UK scheme was rather weighted in the bank's favour. Can the same be said of the Australian scheme?

In making a recommendation or award the ombudsman is required to do so by reference to what is, in the ombudsman's opinion, fair

in all the circumstances. In so doing, he or she is obliged to observe any applicable rule of law or judicial authority and must have regard to any relevant code of practice and principles of good banking practice.

One assumes that in determining liability the ombudsman will follow legal principle, that is, apply relevant statute and common law to the findings established from his or her investigation of the facts. Where this has no application, presumably the ombudsman would then look for assistance to any relevant practice code or good banking practice.

It remains to be seen how the ombudsman will respond to a situation where the strict application of the law or code, or for that matter banking practice, would suggest an outcome that is not in his or her opinion fair in all the circumstances.

The Jack Committee's Report acknowledges the need for clearly established law and good banking practice to provide the framework for informally resolving disputes. It also identifies areas where there is obvious scope for improving banking practice.

The feeling in the United Kingdom was that the ombudsman could only determine good banking practice by reference to the banking industry. In other words, the banks decided the ground rules.

As Professor Everett notes, the Australian scheme does not require the ombudsman to consult with industry in determining what should be regarded as good banking practice.

But she feels that despite this departure from the UK model the effect will be that the ombudsman will still be reactive rather than reformist, because good banking practice can only be ascertained by reference to the industry.

I hope she is being overly pessimistic. I would have thought the structure of the scheme is such that the ombudsman could also seek any views the independent council may have. The council, to my mind, could be said to be within the industry, and given its composition, would be an ideal forum in which to test the banks' suggestions for determining what should be regarded as good banking practice.

The pace of change in the banking industry requires constant review of banking practice. In my view it would not be unreasonable for the public to regard the ombudsman scheme as the catalyst for changes to the law and practice that are clearly in the public interest.

I very much doubt that the public would accept the notion that the banks be the sole arbiter of good banking practice.

Also central to this issue of fairness was the UK ombudsman's inability to compel the production of relevant documents or the

disclosure of information. The Australian scheme is, of course, less restrictive in that it allows its ombudsman to require a bank to provide any relevant information. But as Professor Everett points out, there are limitations.

I have no difficulty with the proposition of access to third party confidential documents being denied where the necessary consent cannot be obtained.

Also, it is not unusual for secrecy to apply to information provided in the course of an investigation. One only has to look at the restrictions that are generally placed on investigating authorities to see this.

While a party may claim confidentiality over material provided, I would have thought this would have to be relaxed to the extent that the ombudsman may wish to test any assertion against the other party. In other words, I think this element of confidentiality will be broken down in practice.

So far as I am aware the inability to compel the production of documents or disclosure of information has presented no real problem in the United Kingdom, and while having to acknowledge the obvious potential, I do not know that it will be a problem here. I suppose we should start with a presumption of good faith and co-operation on the part of the banks and review this against experience.

Of more concern, it seems to me, is the possibility that the banks will only produce or disclose what is asked of them. Essentially placing on a customer the onus of identifying all relevant information is, in my view, placing too much of a responsibility on persons who in most cases would know little, if anything, about the banking system.

But more the point perhaps, is that the ombudsman's determination should follow an inquisitorial, not an adversarial process.

I agree with Professor Everett that the banks should be under a positive duty to disclose all relevant information rather than simply responding to requests.

The issue of "test cases" was something else that the Jack Committee considered in assessing the fairness of the UK scheme. Bearing in mind that the banks will have no appeal from the ombudsman's decision, I imagine there could easily be instances where they will wish to test an issue through another forum.

The Australian scheme has adopted the Jack Committee's recommendations and I have no difficulty with the proposition that the banks in appropriate cases should be able to test their case outside the ombudsman's jurisdiction.

In deciding whether to agree to the removal of a complaint, however, the ombudsman should have the benefit of any views that may be held by the complainant.

Also, I tend to agree with Professor Everett's treatment of the costs issue. The requirement that the bank meet a complainant's litigation costs should extend to any action that may be brought by the bank on the issue. The point surely is fairly resolving the issue, not imposing an arbitrary time limit which may well have the opposite effect.

Finally in looking at whether the Australian scheme is fair, Professor Everett considers its surrounding secrecy. The Australian scheme does not allow the disclosure of any information from which either the bank of complainant can be identified.

I think this issue of secrecy needs to be looked at in the context of the scheme. It is, after all, one alternative dispute resolution process, which does not tie the hands of the complainant. A complainant dissatisfied with the ombudsman's decision is free to further the complaint through the courts or elsewhere.

I draw a distinction between this process and the publicity that attends court proceedings where there is a determination of the rights between the parties that is binding on both sides. From what I can gather, it is not unusual for either the identity or nature of conciliation proceedings to be kept from public view.

The terms of reference do, however, require the ombudsman to report annually to the board, council, and the public. I think it is therefore inevitable that the ombudsman will publish aggregated data on his or her activities.

As I understand it, and even though its scope is considerably wider, the impetus for the scheme was complaints about the operation of electronic funds transfer systems.

After a fairly lengthy development period, governments throughout Australia have approved an industry supported EFTs voluntary code of practice. If the ombudsman is to be the receptacle of the bulk, if not all complaints, how could governments properly monitor the effect of the code without recourse to the ombudsman's data?

I suppose another point, in drawing on Professor Everett's comments, is how in the absence of access to data would governments become aware of recalcitrant banks or problems with new technology that were not being satisfactorily addressed through the scheme. This intelligence is presently available from their own databases. Perhaps it would come to light through expressions of dissatisfaction with the ombudsman's decisions. No doubt this is something that will be closely looked at as the scheme develops.

It will be interesting to see how the ombudsman deals with dissemination of information about unique banking practice, the effect of which would be to identify, but not name, the bank.

On the point of the ombudsman not being bound by previous decisions, I can understand why this is so. The ombudsman should have the flexibility to fashion a decision to meet individual circumstances.

However, I would not have thought this would happen very often. The ombudsman would surely follow previous decisions, where appropriate, and through reports on his or her activities the public should gain an understanding of attitudes to different issues.

Assume for the moment that, on balance, these considerations suggest the scheme is fair, does it then lose credibility by not being seen to be fair?

Professor Everett looks at the structure of the Australian scheme and draws the conclusion that the Jack Committee's observation of the UK model is relevant.

The thrust of this, as I understand it, is that as long as the banks through the board hold the purse strings, and control the composition of the council and terms of reference, there is potentially a serious flaw. There will be a perception that the ombudsman is not genuinely impartial, neutral and isolated from the banks.

I agree that a superficial assessment may give this perception, but I do not believe it will be the reality. If the latter proves to be the case, perhaps there would then be some reason to consider the Jack Committee's statutory alternative.

I am confident that the ombudsman council, particularly constituted as it is, will ensure the necessary independence and credibility of the scheme.

I think the board would be hard pressed to resist realistic budgets and suggested change to the terms of reference that is either generated by the ombudsman or council, where what was proposed is clearly in the public interest. At the very least its reasons would have to withstand public scrutiny.

Provided it is appreciated that it is only one element in an overall regulatory process, I would have thought that the scheme is sufficiently constituted to have credibility in the minds of the public.

More the point, the scheme must be credible in the eyes of governments, consumer affairs administrations and consumer groups.

Despite the fact that state administrations had virtually no collective and, as far as I am aware, individual input into developing the scheme I think its structure, and the extent to which it adopts the Jack Committee's recommendations, should assure it of a sufficient level of support.

Following from this though, I can see the benefit of government input into a periodic review of the scheme. Perhaps it could be left to the Commonwealth authorities to undertake this task ensuring in the process that state views are considered.

I do not however believe that this process of external review is appropriate for proposed changes to the terms of reference. That could be best left to the collaborative efforts of the ombudsman, council and board.

In her paper Professor Everett looks at the scheme's coverage to see whether the inefficiency, or potential inefficiency, identified by the Jack Committee exists in the Australian counterpart. I generally support her comments.

Coverage does seem to be something of a problem. But the point again needs to be made that this is the banks' response to concerns about the banking industry. It is an alternative dispute resolution process.

While there may be sensible, perhaps compelling, reasons to have the scheme cover more of the financial services sector, any extension of coverage beyond what is proposed could, from our state experience, present real problems in establishing and fine tuning the ombudsman's operations. I think there is much to commend a building block approach.

The monetary limit I think is appropriate, notwithstanding that in the UK the jurisdiction has been increased to one hundred thousand pounds. $100,000, of course, is the actual amount that can be awarded, not the total amount of the contract. It would seem to me to be adequate to cover the small types of disputes that I suspect the ombudsman will be predominantly concerned with.

Something on coverage that did surprise me though was that no attempt was made to include the incorporated small business person.

Clearly there is an anomaly in the present scope in that partnerships or professionals will have access to the ombudsman, but a sole trader who often faces the same problems as ordinary consumers, and who is incorporated on the advice of his or her accountant, will be denied access.

I know the difficulties in trying to define small business. But some thought could have perhaps been given to vesting a discretion in the ombudsman to receive complaints from incorporated persons and allowing the ombudsman to take into account the commercial setting, purpose and effect of the contract in deciding whether to exercise that discretion.

As I have already said, on balance I believe that the scheme as structured and through its terms of reference is credible. Its operations, of course, will test this statement.

It does not automatically follow, however credible the scheme is, or appears to be, that it will be accessible to everyone.

The success of initiatives like the small claims jurisdictions is largely attributable to the features of informality, low cost and speed identified in Professor Everett's paper.

With perhaps some caveat on the question of speed (where the terms of reference envisage in some cases at least five months to resolve a dispute) I think these features are achievable.

But equally important for the small claims jurisdictions, and I suggest the ombudsman scheme, are the elements of awareness and access. Obviously its success will be undermined if people do not know about the scheme, do not properly understand it or are put to undue expense or effort in accessing it.

Professor Everett says that accessibility is largely a mechanical benefit to be bestowed by an effective information process and advertising campaign.

Advertising has its place, but as will be seen from the UK experience, and even our own experience in NSW in creating awareness of our Register of Encumbered Vehicles, its utility is limited.

We are told that the UK scheme received wide coverage in the electronic and print media, notices were displayed in bank branches and ten million customers were personally circularised yet the ombudsman council's own research showed the level of awareness at 21%. And of these, I wonder how many understood it?

To my mind the key is having the information available at the time it is needed. This is when the problem arises. Banks' own staff must be aware of the facility and be trained to promote it.

It is no use having it understood and accepted at board and senior management levels and having senior management receptive to involvement in complaint resolution, if those at the coalface are ignorant of the processes that exist within the bank itself to resolve complaints, and the ultimate recourse that clients have to the ombudsman.

Those that are not informed through the banking system and who are persistent enough will usually find their way to a consumer affairs administration or to one of the consumer interest groups. If these organisations have confidence in the ombudsman scheme, and as I said I believe they have, they should be a ready source of reference. Having said that, and although the scheme has been endorsed in principle by Consumer Affairs Ministers throughout the country, I do not know that the detail of the scheme is generally understood throughout consumer affairs administrations.

I suspect that most would be unaware of the issues raised in Professor Everett's paper. That was certainly the case in New South Wales.

A meeting of heads of consumer affairs administrations will precede the SCOCAM Minister's meeting in July. The thought occurred to me that this would present an ideal opportunity for the ombudsman or perhaps a representative of the council (if no appointment is made by then) to allay any concerns that may be held and importantly establish a reference network.

Again on the point of access, our experience shows that there are many people who simply do not like filling out forms or writing detailed statements. Across-the-counter interviews play an important part in our complaint resolution processes. Also, our experience shows that people in country areas do not always like dealing with Sydney, particularly where the cost of travel or phone calls and the like make the exercise cost ineffective. I will be interested to see how these issues are addressed by the scheme.

In her conclusions, Professor Everett spells out certain ideals for a complaints system and concludes that they are met with the exception of independence or perceived independence and investigatory powers.

From my earlier comments you will have gathered that I doubt that in practice either will present a real problem. Only time will tell.