CONSUMER REMEDIES AND THE BANKING OMBUDSMAN

QUESTIONS AND ANSWERS

Question - Peter Short (Chairman):

While you are all busily jostling, could I ask Professor Everett something that she has asked me to ask her. The enforceability of the scheme against the recalcitrant bank - could you say something about that, particularly in view of the article in this *Journal of Banking Law and Practice* by Gregory Burton?

Response - Professor Di Everett:

Actually what happened was that he wrote to me and said "Look, damned awful topic dear, but if it is really boring, set me up with a question!" Professor Robert Baxt is very keen on this scheme, (that is my impression anyway) and being involved in this seminar I blame him for the topic, I then blame him as general editor of this wonderful journal for publishing three weeks ago, an article on the very same topic that I was talking on. So that if you disagree with me, you will find something in this. Gregory Burton in this article raised the question of whether the consumer, the customer would be able to enforce the terms of the arrangement against a recalcitrant bank and puts forward the view in the article that there was no contractual relationship between the customer and the bank. When I thought about this, it seemed to me, without having to go to esoteric estoppel type arguments, you could argue that the customer is accepting an open offer by the banks when they start the dispute resolution process. Each time a customer takes advantage of the system you would come into a contractual relationship - that was a point I had not made in my paper. I didn't want to include this in my talk, because I hadn't included it in the paper. It is in response to this article. I don't know how the audience feels about that. It seems to me you are accepting an offer when you go into the role, backed I would suppose by consideration of the general relationship - I think there may be a problem in consideration but you can probably get around it. That is the issue.

Comment - Peter Short (Chairman):

It is difficult to imagine why the banks would go to so much trouble to set up the scheme and then not support it.

Response - Professor Di Everett:

Yes, but if the bank and/or the ombudsman is the other issue, is there a contract between the customer and the ombudsman to make sure that if the customer wants to use that dispute process that has been offered to them, that they actually comply with the terms of reference. That is the question.

Question - Gordon Walker (Feez Ruthning, Brisbane):

Professor Everett, I am concerned that in these days where we have seen a proliferation of consumer protection legislative provisions, and inferior tribunals to look after the rights of consumers, that the reaction to this scheme might be cynical. Who better to give evidence of good banking practice than the banking industry? Who else in the community can speak on proper banking practice other than the banking industry?

Also why not protect the right of the customer to privacy in his transactions with the bank by ensuring that the identity of the parties in any dispute before the tribunal, the ombudsman, is protected? Is it not reasonable to expect that the banking industry would impose controls so that this ombudsman would not become a monster? They are funding it, they have set it up in response to perceived need. Is it not reasonable to expect that they could impose some controls so that it does not get out of control?

Response - Professor Di Everett:

Yes, I think that it is reasonable if you view it as purely a contractual scheme that is consensual. I think that my cynicism comes from the fact that it is being marketed to the public as quasi-official in the use of the name "ombudsman". If it were being put forward as a common dispute resolution process grafted on to the internal dispute resolution processes that do exist within some of the banks then I would be prepared to accept that more readily. I think the use of the word "ombudsman" is the clue to my cynicism and by setting up what looks like it, if not an ombudsman, it certainly looks like a tribunal, then I think there is an obligation that goes beyond the contractual role there. And that is why I put forward those criticisms.

Comment - Peter Short (Chairman):

Ombudsman, incidentally, I think is a Swedish word for some legal agent or functionary.

Question - Professor David Allan (Mallesons Stephen Jaques and University of Melbourne):

Mr Chairman, with your permission could I add a brief comment on this problem of the contractual nature of it because it has been worrying me as I have been listening, and then ask a couple of questions that Professor Everett and Mr Holloway may care to

comment on. Professor Everett described the scheme right at the start as being basically contractual and I confess I sat there for a while wondering well where are the contracts - and for a while the only contract I could see was between the, well I wasn't sure is it council incorporated - if the council is incorporated, yes, but if the council is not well its ...

> **John Holloway:** It is a Banking Industry Ombudsman Scheme, the council is simply the intermediary that sits between the board which administers the scheme in toto.

Professor Allan: Well I was looking for the contract. Who is making the contract with the ombudsman?

> **John Holloway:** The contract is between the member banks who participate in the scheme.

Professor Allan: All the member banks. Well that was the only contract for a while I could see. I can see the force of Professor Everett's argument that when the customer comes with a complaint, the complainant comes along and goes into the system - that that may bring the complainant into some sort of contractual relation, but as I have listened to Professor Everett's comment and perhaps I had not thought yes, but with whom - with the ombudsman, with the council, with the particular bank, with all the member banks - I am not sure what sort of contracts. The point about this is that I think the question I was going to ask on that is there anything to stop the banks at any stage perhaps without prejudice to complaints that are actually in force, is there anything to stop the banks pulling the plug, changing the terms of reference or walking away from it? You may say it is unthinkable that they would do it, but the point is it does go to the very issue of credibility and I agree that it is unthinkable that the banks would do that sort of thing because it will attract so much odium and it is not on. But credibility is at stake there.

But there were two particular points that have been worrying me on which I would like a reaction. The first of them I looked at an early draft of this proposal last year and the proposal was that the complainant must first exhaust existing procedures within the bank before he or she could make a complaint to the ombudsman. I think that this affords too much opportunity for delay. It is not the problem of bank officers saying no, but of the officer who loses the matter of complaint or pops it into a drawer of his desk and forgets about it.

About that time I had a student who complained that he had lost his credit card and somebody had gone to the bank and forged his signature, used the credit card and over the counter had drawn out the entire savings, his entire earnings over the summer which were intended to see him through the next term. And the thing is it was rather urgent - he can't afford to hang around five or six months in cases like that. So that is an aspect that always worries me and I notice that neither Mr Holloway nor Professor

Everett referred to it. I wondered is that feature still in it. Is anything being done to tackle the question of simply delay.

The other point is that - the point was made at the seminar we had last year that it is necessary at some stage to relate this scheme to the legal system. It cannot exist entirely in the realm of contract. I think somebody did refer to the question of whether the award that the ombudsman made would be legally enforceable, but what is the relationship to the legal system generally, to tribunals, small claims, credit tribunals, to the courts, does the complainant by coming into the scheme suspend his right, does he agree not to go to the courts or can he do so? At the moment it looks, if you take it with a five or six month delay, the advice would be well don't do that, use the legal system where you are not subject to that. Is there any system for review of either the procedures or the decisions particularly on point of law of the ombudsman either administratively or judicially? Has anybody given any though to how it fits into the whole of the legal system? And I don't think you can just set it up, say here is a plan that the banks are going to offer this official to do this, but dealing with contentious legal issues and not say how it relates to the legal system. I would welcome comments from the Panel on that.

Response - John Holloway:

You have raised a number of issues. I think it inevitable that this scheme is going to find its way into the courts. No doubt about it. The whole concept of it is designed to keep it out of the court system. In fact the only relationship it would have with the court system would be if the bank did not obey an order and there was some need to enforce an order; and my view is that is the Banking Industry Ombudsman Scheme taking that action and not the individual complainant? And one could also ask the question where a small consumer for example would get the means and have the wherewithal to be able to enforce it?

You are right about having to exhaust all procedures. I made the point in the comments that I made on Di's paper that the banks have got three months to let it go through whatever dispute resolution facilities they have in their own organisation, and clearly there is an incentive for them to set them up. They could get a complaint about that student, and they could put it in the drawer and just leave it there for three months, absolutely nothing done on it, before he could go to the ombudsman; once it gets to the ombudsman, on my reckoning it could take anything up to four months to get a result there. So you are looking at six or seven months before you would get any answer from the ombudsman, if then. And I tend to agree with you. I think there will be a lot of people who will be voting on the scheme with their feet and going to some other forum where they might be able to get a decision from our consumer claims tribunals within six or ten weeks or whatever the period is in a State. So I think that is a very good point.

I'll leave the other issues for Di to comment on. If I could just pick up on one other issue that the gentleman before raised and that is typically whenever you see a scheme introduced people look at what it is going to do to them and not what it is going to do for them. Now I think the banks should really have a close look at just what this scheme can mean in terms of marketing their services.

Response - Professor Di Everett:

A great deal of the motivation from the banks is not just for the benefit of consumers. The banks are well aware that a scheme like this advantages their public image (which is perhaps in need of some help at the moment) as far as public perceptions go.

As to the contractual basis problem that Professor Allan raised, it seems to me that there is a contract between the participating banks relating to the funding of the company limited by guarantee. I think that is clear from the terms of reference we are seeing. But it seems to me the contract that comes into existence, which it does when an individual customer of the bank accesses the scheme, is between that individual customer and that bank. But if the bank doesn't perform on an award that has been given within the terms of reference they would be able sue in contract. Now of course as you say that may well be an unrealistic remedy, but I think that is one of the contracts that actually exists. I think that you can argue that there exists also in similar circumstances a contract between the individual customer and the ombudsman to carry out his obligations under the terms of reference and perhaps you can sue in contract against him. I think you probably - I don't know the remedies under the *Trade Practices Act* for misleading or deceptive conduct against the banks generally - if this scheme fell through I don't know one could run those. But I do think there are sets of individual contracts that you could construct out of the scheme. But again suing in contract is not necessarily what this scheme is meant to do.

The other issue was a review of decisions on questions of law. The terms of reference deal with questions of law by enabling the ombudsman to refuse to carry on with the dispute resolution process if he considers that there is an issue of law that needs to be referred off to a more appropriate forum. And assuming that the ombudsman carries out his duties that will probably work relatively effectively. There is obviously no system for review of the actual decisions of law. It is contractual and that is the end of it. I mean there are alternative processes for all customers who are unhappy. In other words a customer can get to the stage of having an award made and then having a month to decide whether they actually accept that determination by the ombudsman. So at that stage they can take the issue to normal tribunals or courts.

Comment - Professor David Allan (Mallesons Stephen Jaques and University of Melbourne):

If Professor Everett is right that there is a contract between the complainant and the ombudsman then I think she has answered the third question because that contract is the basis by which you get any judicial review if the ombudsman erred in law or procedure. But I have a little hesitation with it. I would like to state that. I would rather see it spelled out.

Response - John Holloway:

I frankly can't see that contract but it may well prove obvious. The other point you made is about the changing of the terms of reference. A board sits above this council which is chaired by Sir Ninian Stephen. And it is the board that decides whether or not there will be any changes to the terms of reference. As I understand it the board comprises the Executive of the ABA.

Response - Professor Di Everett:

Yes, that is what their press release said and that is the latest thing I was able to discover, that it was the Executive of the ABA plus a member of the Reserve Bank. That is the press release and I have not been able to find anything else.

Response - John Holloway:

But the point is well made. I mean they control it. So in other words if the terms of reference are not giving the ombudsman the teeth that he or she needs to do something, they are the only ones that can change it. And just drawing on the point that the gentleman before raised, it certainly is a softly softly approach. There is no doubt about that. Someone has suggested to me that the banks want to hide and do nothing - and perhaps that is the reasons why they have couched it in the terms that they have. But certainly to my way of thinking when you look at the English scheme, when you look at the criticisms that were made of the English scheme by Professor Jack, it has certainly come a long way to what they had there. I certainly do not think that there is any call in Australia for it to be statutorily based.

Question - Professor Robert Baxt (Trade Practices Commission, Canberra):

The Trade Practices Commission and Treasury have been doing quite a bit of work in relation to the EFTS Code that has been in place for some years now. In relation to that particular work, at a forum that we held last year in June we were able to I think debate with the consumer groups, and they were all represented, the various issues as to which type of approach might be best set in place to deal with the sorts of problems that are going to be considered by the ombudsman.

It is interesting to note that had the banking group or the Association itself not introduced the ombudsman, one bank in particular, one of the large banks, would have introduced an ombudsman for itself. It was quite clear to me, I was talking to the managing director of that bank, and that would have happened and I think we might have had some interesting competition issues as to which bank was going to offer the best ombudsman scheme. Maybe that would have been a much better system than have this system organised by all the banks. But as Di Everett has indicated, the finance industry as such has wanted to get into the scheme and at this stage the non-banks are not part of it.

The public relations benefit that will flow from this I think is clearly recognised by other players in similar industries. There is at present, I think many of you are aware, discussion between the insurance industry and Treasury and Consumer Affairs on the possible establishment of an insurance ombudsman both for the life and the non-life part of insurance. And that is an interesting development that may well see another non-government ombudsman scheme put in place.

I am fascinated by the way in which the code of conduct in relation to the FDS will work side by side with the operations of the ombudsman. You may have noticed in the press about three weeks ago that the Victorian Government was interested in introducing legislation to give legislative backing to the FDS Code through the *Fair Trading Act*. Victoria, New South Wales and one or two other States have the ability to call up codes through the provisions of the *Fair Trading Act*. I think that the Victorians have been talked out of that in relation to that particular initiative, but the codes as Di Everett and John Holloway have indicated which led to the push for the creation of the ombudsman, may well be given legislative backing by individual states if for some reason or other they don't work or if the consumer movement feels that the scheme is not working effectively.

So there is some interesting pressure that can be put on the banking industry and generally in that regard and the Trade Practices Commission and Treasury has an obligation to report to the SCOCAM meeting in July on whether that EFTS Code or a revised Code is working effectively.

I came in a little late (and I apologise for that) and I just wondered whether Di Everett covered in her earlier comments the question of the resources that have been put into this scheme and the ability of the ombudsman to deal with what I think will be quite a large number of complaints that will be brought to him or her, I understand it is a him and the announcement will be made shortly, in the first months of the scheme. The ombudsman will be operating out of Melbourne, as I understand it. Are there going to be provisions for people to deal with cases in other states? How is that going to be dealt with? One of the problems that we at the Commission face, and it is an enormous problem all Commonwealth agencies face, are the significant costs of getting

around this huge country of ours and making sure that we don't forget about our colleagues in Perth and Brisbane, let alone some of the other towns that are further west, or not further west but further north and south. That is a real problem for us at the Commission. I don't wish to underestimate that that is one of my greatest headaches - and that is the ability for us to get round to see the way in which our officers operate in these other states. And I just wonder how the ombudsman scheme is going to deal with that particular problem.

Comment - Peter Short (Chairman):

Would anyone else like to make a comment on that?

Well if that exhausts you it remains for me to thank John Holloway and Professor Di Everett for turning what looked on paper to be a dull topic, into something that was from my perception, quite interesting. I look forward to the scheme coming in, and look forward to some of these problems being solved. Could you please show your appreciation for the speakers in the normal way.