BANKING OMBUDSMAN

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The Australian Banking Industry Ombudsman

INTRODUCTION

By the time I present this paper to the Banking Law Conference, the Australian Banking Industry Ombudsman Scheme will be six weeks short of its second anniversary. It is therefore timely to reflect on the experience of the first two years.

The Australian Banking Industry Ombudsman is the first industry based, Australia wide, alternative dispute resolution Scheme. The Scheme had its genesis in a spirit of co-operation between the banks, the government and representatives of the consumer movement and is modelled on the 1986 United Kingdom Banking Ombudsman Scheme.

It is a true alternative dispute resolution Scheme and is very "complainant friendly" in that access to the Scheme does not require a prospective complainant to relinquish the ordinarily available rights of access to the courts in order to approach the Scheme.[1] The decision by the participating banks to relinquish, by agreement, their rights of access to the courts in favour of a customer who accepts the Ombudsman's decision is significant, not only for the banking industry but for alternative dispute resolution generally. It sets a high standard against which other alternative dispute resolution schemes can be evaluated. It is certainly one of the criteria against which the banks' commitment to the Scheme can be judged. Finally, the decision reveals a level of maturity and self confidence in the banks' approach to accepting the decision of the Ombudsman without any appeal process.

There are a number of matters on which I wish to comment. I shall start with the use of the term "Ombudsman".

"OMBUDSMAN"

Originally a Scandinavian word meaning "advocate of the people" the term, since its introduction to Australia via New Zealand in the late 1960s and early 1970s, has been used in the context of a specific statutory appointment.[2] The role of statutory Ombudsman has traditionally been advisory only (with the exception in the case of New Zealand where the Ombudsman has a limited determinative function in Freedom of Information cases). The recent report of the Senate Committee reviewing the office of the Commonwealth Ombudsman declined to recommend the Commonwealth Ombudsman's role be changed to give him determinative power or even that the Ombudsman's recommendations when made to Parliament, should become binding if not disallowed by Parliament.

The concept, therefore, of a private sector non Statutory Ombudsman with determinative powers involves a twofold departure from the "traditional" Ombudsman concept in Australia. This has raised, at least initially, some concerns from Statutory Ombudsmen. In the wake of an announcement by the New Zealand Banking Industry that it was proposing to follow the Australian example and introduce a Banking Ombudsman, the New Zealand Parliament amended the Ombudsman Act (1975) to prohibit the use of the name "Ombudsman" without the consent of the Chief Ombudsman. The Chief Ombudsman has published criteria pursuant to which his consent to the use of the name "Ombudsman" would be given. I have set out those criteria in the footnote[3] but they are, in the main, aimed at ensuring the holder of a position entitled Ombudsman is independent and is able to receive complaints directly from a complainant, free of charge, as well as impartially investigate and "conclude with a decision not to sustain or sustain and, if appropriate, achieve a remedy". The task is more complicated in Australia because of the multiplicity of jurisdictions which need to be involved in arriving at uniform legislation.

Some banks have moved to describe their internal dispute resolution officers as "Ombudsman". It is a practice which the Banking Ombudsman's Council has discouraged because, apart from any of the broader considerations mentioned above, it will inevitably lead to confusion in the public arena with the role of the industry wide based Ombudsman.

THE STRUCTURE AND FUNDING OF THE AUSTRALIAN BANKING OMBUDSMAN SCHEME

One of the first things which is likely to strike an observer is the apparently complicated structure surrounding the Scheme. The member banks have formed a company limited by guarantee called "The Australian Banking Industry Ombudsman Limited". The shareholders of that company are the participating banks. They elect a Board, the membership of which is not limited to the participating banks and includes one of the Assistant Governors of the Reserve Bank.[4] The role of this Board is limited to approving funding for the Scheme and making final decisions on changes to the Terms of Reference.

Standing between the Board and the Ombudsman is a Council consisting of three consumer representatives and three banking representatives and chaired by an independent Chairman, Sir Ninian Stephen, a former High Court Judge and Governor General. In some ways the Council is a rare alliance and one which was no doubt approached with some suspicion by both consumers and bankers who are not traditionally comfortable bedfellows. However, whatever the initial suspicions, the Council has operated extremely well and the independent Chairman has not yet had to exercise his casting vote.

It is the role of the Council to appoint the Ombudsman; assist with the development of policy as well as to advise the Board of the funds necessary for the operation of the Scheme; to receive and consider suggestions from the Ombudsman for changes to the Terms of Reference; and to make recommendations thereon to the Board. The Council has no power to intervene in the handling of day to day cases and has no appellate function with respect to any decision reached by the Ombudsman on any complaint.

Importantly for the Scheme, the structure addresses the problem of separating the Ombudsman from the industry in those areas where his independence could be seen to be infringed. The Ombudsman's independence would be severely infringed if he was required to deal directly with member banks in the negotiation of the funding necessary for the operation of the office. As it is, I am pleased to report that the parties have

adhered scrupulously to the proprieties envisaged by the structure and that the Board has acceded to the funding requests as made by the Council.

It is essential, if public confidence is to be maintained in the Scheme, that the Ombudsman is not only independent but is also seen to be independent. The issue of independence is reinforced by a requirement that the Ombudsman is free from either Council or Board interference and is required to publish an Annual Report "to inform the community of his activities".[5]

There are several other elements contained in the Terms of Reference which reinforce the independence of the Ombudsman including his power to determine whether or not a matter falls within his jurisdiction.[6]

The Scheme is funded by the banks ($2 million in the first year; $3.3 million in the second year) on the basis that the bank which has the most complaints pays the most to the maintenance of the Scheme. As well as incorporating a user pays principle, and no doubt lightening the burden of the tax payer, the funding arrangements encourage the banks to resolve their own disputes rather than encouraging complainants to turn to the Ombudsman's office. The direct financial incentive in the latter aspect is one banks should bear in mind when examining complaints.

THE TERMS OF REFERENCE

The Terms of Reference are the agreement between the member banks setting out the powers they are prepared to cede to the Ombudsman. The Terms of Reference emphasise the need for a complainant to try to have resolved his/her complaint with the "senior management of the bank" (Clause 20 (b)), otherwise the main features are:

- has the final power to determine whether a matter falls within his Terms of Reference;
- has determinative power to make an award up to $100,000, which, if accepted by the customer, becomes binding on the bank;
- can determine the procedures of his office in considering disputes and accepting referrals;
- can, with the consent of the customer, obtain the bank file of the customer or bank held information relating to the dispute; and
- can determine what is "fair in all the circumstances" with reference to the law, principles of good banking practice or codes of practice.

The Ombudsman is not empowered to consider disputes about:

- a member bank's commercial judgment (except where there is an allegation of maladministration); a bank's general interest rate policies;
- an amount claimed, or which can potentially be claimed in respect of the subject matter, which exceeds $100,000;
- a practice or policy of a bank which, in itself, does not give rise to a breach of any obligation or duty owed by the bank to the customer;
- banking services provided to a body corporate;

- a dispute already the subject of proceedings in a court, tribunal and/or where a judgment on the merits has been given; and

- an act or omission which first occurred before 10 May 1989, unless the customer with due diligence could not have become aware of it until 10 May 1989.

One of the most difficult decisions is determining whether a matter falls within the Ombudsman's jurisdiction. A large number of telephone enquiries (estimated 36,000 to June 30, 1991 and current trends are maintained rising to more than 50,000 in the year ending June 30, 1992) are referred to bank referral points but the public are advised it is open to them to return to the Ombudsman's office if their complaint remains unresolved providing it falls within jurisdiction. To June 30, 1991, one third of written complaints were found by the Ombudsman to fall outside the Terms of Reference. It is likely that there will be a small drop in this figure during 1991/92 as the parameters of the Scheme become more widely known.

I have treated the Terms of Reference as being analogous to an Act of Parliament. Since the Scheme has a remedial purpose, the Terms of Reference should be interpreted, in cases of doubt, so as to include rather than exclude a complainant from having access to the Scheme.[7]

For that reason I have, for instance, allowed limited access to some guarantors to the Ombudsman's office.[8]

The decision of the Ombudsman as to whether a matter falls inside or outside the Terms of Reference is final. Given the Terms of Reference represents the agreements between the banks as to the jurisdiction of the Ombudsman, it is unlikely that a bank could successfully challenge in a Court the Ombudsman's ruling that a matter was within jurisdiction. In circumstances in which a complainant may wish to challenge whether the Ombudsman has jurisdiction, it is equally unlikely the court would grant access because the existing rights of a complainant to turn to the courts have not been excluded by the Scheme.

Under this heading I should finally note that the Scheme does not only extend to bank customers. It extends to the provision of banking services "to any individual". Given the broad definition of banking services to mean:

> "all financial services provided by banks in the ordinary course of their business to individuals, including credit card use overseas, and advice and services relating to insurance and investments;"

I have taken the view that complaints relating to the processing of cheques fall within the Scheme.[9]

ACCESS

It is important to achieve two objectives with respect to access of consumers to the Scheme:

- complaints should, in the first instance, be referred to senior management within the bank concerned to effect resolution if possible before they come to the Ombudsman; and

- when the dispute is deadlocked, the complainant is aware he/she can approach the Ombudsman Scheme.

Both of those broad objectives have been achieved by the banks' co-operation in the display of the Ombudsman pamphlets in every banking chamber throughout Australia. The form is returned from the complainant to the senior management of the bank concerned in the first instance. This has helped overcome a problem facing consumers, namely where to turn to within the banking system when they have a complaint. It has also encouraged the banks to produce such pamphlets and in light of that growing movement, Council will review the need for the continuing display of Ombudsman pamphlets in their current form at the end of 1992.

Progress has been made in developing mechanisms to provide access to the Scheme for non-English speaking people and people with other disadvantages, eg illiteracy.

EXPERIENCE TO DATE

I am one of the few people employed by a company with the aim of putting the company out of business. I have been singularly unsuccessful against the current trend in Australia, perhaps particularly so in Victoria, where many people are working excessive hours and under considerable financial and other pressures in order to keep their doors open. My staff is now reaching towards 30, exactly double the number I had envisaged as being necessary at the time of my appointment. I note, however, that the number of banks participating in the Scheme has increased with the joining of the former State Bank of Victoria, the State Bank of New South Wales, Metway Bank and the Trust Bank of Tasmania.

The number of written complaints received in the first year to June 30, 1991 was 2,626. As at that date, 1,116 (or 42.5%) were concluded, 829 (31.6%) were found to be outside the Terms of Reference and 681 (25.9%) were still open (ie under investigation). An expedential growth in the number of written complaints received will probably result in an increase, at least 75%, in new incoming complaints for the year ended June 30, 1992. This has imposed a large workload on the office and I am sure the pressures felt by my office are being equally experienced in the banks' own complaint resolution centres.

There may be many reasons for the seemingly large increase in complaints against banks, but the following factors are no doubt playing their part:

- Economic depression;
- A growing consumer confidence and sophistication;
- Greater public scrutiny of the banks through Parliamentary Inquiries and the media. (I have given evidence to three separate Federal Parliamentary Inquiries in the past six months);
- The need for greater appreciation amongst member banks of the cultural change which needs to be made to resolve complaints on the basis of fairness rather than just by reference to the law alone.

If they had not done so earlier, all banks have established complaint resolution sections to deal with the processing of complaints received from the Ombudsman's office. My general policy is to refer matters to the banks first to allow every available opportunity for the matter to be resolved between the bank and the customer. I note that of the 1,116 cases closed by June 30, 1991, 740 (66.3%) were resolved by the banks without any further intervention necessary from the Ombudsman's office. This is an encouraging sign and one which I hope will be reflected in the 1992 figures.

A total of $1.4 million was either awarded or settled in favour of customers during the first year of operation of the Scheme. It is likely that that sum will be larger in the second year resulting from a receipt of a greater number of complaints. To date, the smallest award has been $2.00 and the largest in excess of $90,000. It is not, however, the size of the award which is important but rather the principle involved in the resolution of the cases.

RESOLVING DISPUTES

(a) Fairness and the Law

Clause 15 of the Terms of Reference requires the Ombudsman resolving disputes to:

- "do so by reference to what is, in his opinion, fair in all the circumstances";
- "observe any applicable rule of law or relevant judicial authority"; and
- "have regard to general principles of good banking practice and any relevant code of practice applicable".

There is an initial question as to the inter-relationship between the three criteria. The observance of a rule of law may lead to an unfair result and there is a question of which of the two mandatory criteria should be given precedence. Generally I have approached the resolution of this question by giving precedence to the issue of "fairness". I have not done so, however, so as to purport to "overrule" any rule of law or relevant judicial authority. Where, however, in a particular case the result may be seen to be unfair and there is some ameliorative action which can be taken to obtain a fair result, then that course should be followed. I have taken this view because this is an industry based Scheme and it is the stated standard of fairness in all the circumstances which the industry is promoting with the introduction of the Ombudsman Scheme.

The procedures I have devised however for deadlock disputes generally result in the bank and the complainant finding their own resolution to the problem without the need for me to proceed to a Recommendation or Award. Clause 10 of the Terms of Reference provides:

> "At any time that a dispute is under consideration by him, the Ombudsman may seek to promote a settlement or withdrawal of the complaint by agreement between the applicant and the Bank concerned."

In order to implement this provision, I have adopted procedures in which I act as mediator rather than arbitrator in order to have disputes resolved.

To do this, I bring the bank and the customer, and any legal or other representatives which the parties may wish to bring, together at a conference at which the dispute is addressed. In that conference, which occurs at a venue convenient to the complainant, the Ombudsman or his representative is to act as a facilitator or mediator rather than in an arbitral role. The aim is to have the parties reach their own resolution for the particular problem. To date, the figures indicate that approximately 90% of deadlocked matters resolve at such conferences.

Such resolutions are, in my view, particularly appropriate for an industry based Scheme because both the complainant and the bank have participated in finding their own solution to the problem. To that extent they both "own" the decision and are more likely to retain the banker/customer relationship than is the case if a decision is imposed. The existence of a dispute threatens the important trust element in the banker/customer

relationship; a mechanism which provides for the parties to work through the cause of the dispute and find their own solution will not only remove the threat but, in the majority of cases, lead to the banker/customer relationship being strengthened. Such a result is less likely to occur in cases where a decision requires the use of the arbitral function.

There are further advantages which flow from the conference mechanism. The parties can have input into the solution which may, and often is, found in an adjustment occurring in some area of the banker/customer relationship other than the one giving rise to the dispute. The parties are often able to find solutions which will avoid further conflict arising. From the customer's perspective, an awareness that the bank takes the dispute seriously at (usually) a regional management level (or above) is both important and reassuring.

There is always a subjective element in any assessment of what is "fairness in all the circumstances". Indeed the Terms of Reference expressly recognise this by the use of the words "in his opinion". It is futile to try and define "fairness" beyond mentioning it is a term ambulatory in nature depending on the individual circumstances of a particular case and that it incorporates notions of equity, justice and reasonableness.

The concept extends to both the complainant and the bank and should be weighted equally in any consideration by the Ombudsman.

Achieving the concept of fairness has been and should be used by the Ombudsman in the amelioration in individual cases rather than broadly to herald reform of banking practices.

(b) Good Banking Practice

To assist in determining what is good banking practice, I have a senior banker on secondment with the position revolving annually between participating banks. Additionally the Board have, at my request, also made available an Expert Banking Committee to assist in giving advice in unusual or difficult situations. To date, six such references have been made.

There well may be a distinction between "usual" banking practice and "good" banking practice.

There is no manual of good banking practice. I take the term to mean that common practice which the industry as a whole applies to banking transactions. The boundaries of what constitute good banking practice are ever changing and seemingly at an ever increasing rate.

The increase in the number and complexity of banking products on the market, the greater consumer awareness, the need in a competitive market to provide more information and greater disclosure, the impact of Federal and State legislation and heightened media interest in banking have all played their part in forcing the banks to constantly examine what constitutes good banking practice. It is becoming more and more apparent that a Code of Banking Practice ought to be developed and made publicly available. Such Codes have been introduced in both the United Kingdom and New Zealand this year. The industry in Australia has publicly committed itself to the introduction of a Banking Code of Practice.

At the time I was appointed, I was told that Electronic Funds Transfer disputes would occupy a lot of my time. This has transpired not to be the case and my statistics reveal that at the end of the first year of operation, Automatic Teller Machines disputes constituted 6.2% of the complaints received. These complaints have been resolved in

the main by a direct reference to the Code. The very existence of a Code, in my view, has lessened the number of potential disputes in this area and strengthens the case for the introduction of a General Code of Banking Practice. It should not be thought that the introduction of such a Code will act as a panacea to cure all ills. It will, however, clarify banking standards, have a public educative function about what to expect from banks and should act as a spur to increase competition.

I should mention with the introduction of any such Code that I do not regard it as the Ombudsman's role to participate in the drafting of the Code or in its ongoing monitoring. The Ombudsman should be free to comment on the drafting of the Code and on the way in which it is implemented, but should not in any sense own the Code.

EMERGING ISSUES

It was difficult in our first year of operation to draw too many conclusions from the monitored statistics (remembering we are looking at 1,116 closed cases). In the second year of operation there will be more material on which to draw. It is, however, plain that the majority of disputes surrounded lending products (53.4% in the first year). The next highest category relates to payments system problems (11.7%). It will no doubt be of interest to bank lawyers to learn that it is apparent that contractual problems rate so highly amongst complaints received by the Ombudsman's office. It is plain that a breakdown of communication is the cause leading to those problems. There is a greater need for quality in documentation and clarification of communication to customers.

I endorse the Australian Bankers' Association's commitment to the use of "plain English" documentation. Plain English is, however, only one element of the resolution of the problem. Other elements involve more comprehensive disclosure (again, I note the Australian Bankers' Association's Disclosure Code issued in May 1991), as well as careful notation by bank personnel at the time negotiations are carried out between banks and the customers. Customers must also accept some responsibility for ensuring they take the time and trouble to read and understand the main clauses governing their contracts. It is becoming less and less acceptable for customers to seek to apply pre-deregulation thinking to their negotiations with banks.

Third party guarantees continue to cause concern. I do not believe such guarantees should be outlawed. However, if the sole basis of a loan to a principal debtor is the security provided by a third party and that third party suffers from a disadvantage (eg, lack of comprehension of the nature of the guarantee), then it is almost inevitable that the guarantee will be found to be unenforceable. Apart from any legal constraints, it is increasingly embarrassing for financial institutions to find themselves in the position of trying to execute against owner occupied properties of elderly relations who have no other assets other than their home and many are depending on the age pension in order to recover as the result of the giving of the guarantee. Whilst not a comprehensive answer, the South Australian legislative provisions requiring a guarantee to be witnessed by the guarantor's individual solicitor before the guarantee can be enforced, is a move in the right direction. There is nothing to stop banks from implementing policies which will cover the majority of situations which arise in challenges to third party guarantees.

THE FUTURE

There is increasing interest in alternative dispute resolution in Australia as the higher costs and legal technicalities associated with court proceedings continue to place courts outside the reach of middle income earners. Interest in the structure of the Scheme has been expressed by a number of other industries, eg telecommunications, motor industry and the press. I believe other schemes on much the same model as this will emerge over time. Properly approached, the Scheme has much to offer the industry apart from

its obvious public relations benefits. The identification of industry wide problems can lead to a co-operative industry solution avoiding legislative intervention. At industry level, the building of relationships with customers and the maintenance of better relationships must incorporate a process whereby disputes, which inevitably will arise, can be resolved.

My aim is to put myself out of business. I realise that will be impractical, but certainly what is practical and what can be achieved is a reduction in the number of complaints that need to be processed through my office. All people with an interest in banking at all levels, including legal practitioners, will inevitably be involved in dealing with complaints - if not directly, then indirectly (eg by the drafting of documents which will plainly set out parties' responsibilities so that disputation will be minimised). I would hope that over the next two years the number of complaints which my office is actively engaged in will reduce. Your assistance as bank lawyers will contribute to that process.

FOOTNOTES

1. I note a contrary view is taken in the Australian Law Reform Commission Discussion Paper 50 (January 1992) in its consideration of the establishment of a Superannuation Ombudsman Scheme (Paragraph 9.26).

2. There are some exceptions to the use of the term "Ombudsman" even in the statutory context, eg in Western Australia, whilst popularly referred to as the Ombudsman, the correct title is "Parliamentary Commissioner".

3. Refer Appendix.

4. The Reserve Bank itself is not a member of the Scheme. However, I note the Bank of England, which offers retail banking services to the Monarchy as well as to its employees, has joined the UK Banking Ombudsman Scheme.

5. Clause 29 A - To inform the community of his activities the Ombudsman shall publish an Annual Report.

6. Clause 3 - Subject to the other provisions of these Terms of Reference, the Ombudsman shall, in his own discretion, decide the procedure to be adopted by him in considering disputes. He shall also decide whether or not a dispute falls within the Terms of Reference, and in reaching this decision shall consider representations from the disputant and from the Bank concerned. When requested, he shall give the reasons for his decision of whether or not a dispute falls within the Terms of Reference, in writing, within a reasonable time.

7. See **Re British Columbia Development Corporation v Friedman** (1984) 14 DLR (4th) 129 (particularly at 131), **Commonwealth of Australia v Ford** (1986) 65 ALR 323 per Wilcox J at 329.

8. It is plain that the principal debtor is covered by Clause 1, ie a banking service is extended to the principal debtor. In circumstances where the principal is himself/herself guaranteed by an individual, I regard banking service as being extended to that individual guarantor. In circumstances where the guarantor is a company or the principal debtor is a company then since the Terms of Reference only deal with individuals, I have excluded them from the Scheme.

9. A similar decision has been reached by the United Kingdom Banking Ombudsman (see Annual Report 1988/89 - pp23-31).

APPENDIX

SETTING STANDARDS FOR INDUSTRY "OMBUDSMAN" (SECTION 28A, OMBUDSMEN ACT 1975)

The criteria for guidance is:

1. Unless authorised by statute, no position entitled "Ombudsman" should be established in any area where the Ombudsman has or may be given jurisdiction under either the Ombudsmen Act 1975 or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987. Such a position would confuse the public and undermine the constitutional role of the statutory Ombudsmen.

2. Where it is proposed to have an "Ombudsman" type position which did not conflict with the position in 1. above, the holder of the name "Ombudsman" must be appointed and funded in a manner which enables him/her to operate effectively and independently of the organisation which will be subject to the role. The position should also have a publicly notified Charter in plain language which is constantly before the consuming public. The appointed Ombudsman should have the right to make recommendations to change given aspects of the Charter.

3. The role of the person proposed as an "Ombudsman" is to receive complaints directly from a complainant, free of charge, and impartially investigate the facts, and conclude with a decision to not sustain or sustain and, if appropriate, achieve a remedy. The name Ombudsman would not be agreed if the role was seen to be a counsel or advocate for special interest groups. The position will need to be seen to be independent and impartial by both the consumer and the organisation to ensure maximum effectiveness and influence. [As an indication of the public interest reasons for independence and impartiality, an extract from a publication of the Australian Banking Ombudsman is attached as an annex.]

4. The use of the name by a non Parliamentary Ombudsman will be of greatest value to consumers when the appointee operates in a jurisdiction which is national in character. Permission to use the name "Ombudsman" will not normally be granted for unique local or regional roles.

5. Where all the above criteria are met the term "Ombudsman" should not be used alone, but only in conjunction with a description which makes the role clear, eg "Banking Ombudsman". The name on this basis to be used in the public Charter and in correspondence and publicity.

6. All approvals will require that the approved Ombudsman will produce an annual report and make it publicly available. Additionally, it will be desirable that the Ombudsman scheme be subject to periodic public reviews to allow consumers to indicate the degree of credibility which they accord the complaint system being followed.