FAIR AND REASONABLE – AN INDUSTRY OMBUDSMAN'S GUIDING PRINCIPLE

*Simon Cohen**

Industry ombudsmen are amongst the most recent of the array of institutions and arrangements that have modernised, even revolutionised, administrative law in Australia since the early 1970s.

I confess they are at first brush something of a curiosity – a fabulous monster according to one commentator[1] - an independent ombudsman funded by industry to resolve consumer complaints.

This paper collects some thoughts about "fair and reasonable", which has become something of a touchstone for industry ombudsmen when dealing with complaints and determining cases.

First, however, I will outline to some of the common attributes of industry ombudsman schemes.

Industry ombudsmen

Industry ombudsmen are independent consumer dispute resolution services. They are a fairly new initiative in Australia, with current schemes beginning in the early 1990s. For example, of the two substantial national industry ombudsmen:

- the Financial Ombudsman Service ('FOS') – which deals with banking, credit and insurance complaints – can be traced back to 1990 and the establishment of the Australian Banking Industry Ombudsman; and

- the Telecommunications Industry Ombudsman ('TIO') was established in 1993.

Today, there are also industry ombudsmen in most Australian states to deal with energy and water disputes, a Postal Industry Ombudsman and, in Victoria, the Public Transport Ombudsman, which deals with disputes about train, tram, bus and related ticketing, information and infrastructure services. Some roles – such as the Energy Ombudsman in Western Australian and the Postal Industry Ombudsman – are performed by statutory ombudsmen for these jurisdictions.

Key attributes for industry ombudsmen include the following:

- they provide an independent and external avenue to resolve complaints that customers cannot resolve with service providers;

* *Simon Cohen is the Telecommunications Industry Ombudsman. Prior to this, he was the Public Transport Ombudsman, Victoria. This paper was presented at the 2009 AIAL National Administrative Law Forum, Canberra, 7 August 2009.*

- they provide services at no cost to consumers; and

- they focus on informal and timely resolution of disputes, but where agreement cannot be reached, a decision, binding on the service provider, can be made.

Usually, although not always, the schemes are in the form of private companies, where the members of an industry are also members of the company providing external dispute resolution services, and bound by contract to observe the rules of the company. This includes being bound by decisions of the ombudsman.

Most often, service providers are required to be members of an industry ombudsman or external dispute resolution scheme by force or law, regulation or contract with government[2]. Industry ombudsmen exercise functions under a Charter, Constitution or Terms of Reference which specifies matters such as the complaints the ombudsman can consider, the monetary limits of jurisdiction and requirements on members to provide information.

The monetary amounts are substantial. The FOS can make awards of up to $280,000, the Victorian Energy and Water Ombudsman ('EWOV') up to $20,000 and the Public Transport Ombudsman ('PTO') up to $5,000.

While industry ombudsman company structures differ, generally there is provision for equal industry and consumer representation on the governing board or council, with an independent chairperson. This governing body will have the usual corporations law requirements in terms of financial stewardship, and also a role in advising on or setting policy, while guaranteeing the independence of the ombudsman in dealing with individual complaints.

Industry ombudsmen make a substantial footprint. In Victoria, members of industry ombudsman schemes provide many essential 'public' services – water, energy, public transport, telecommunications and banking. Members of industry ombudsman schemes provide the electricity to power your alarm clock, the power and water to poach your eggs, the phone you use to ring your mother or son, the internet you use to check your email, the train or tram you use to get to work, and the automatic debits or credit card payments you have arranged to pay for these services.

In the United Kingdom, industry ombudsman schemes are even more pervasive, with a waterways ombudsman to deal with complaints about moorings and the use of British Waterways, the property ombudsman to resolve complaints about real estate agents, related to both selling and letting properties, and the removals industry ombudsman to handle complaints from customers of removal companies.

While comparisons are often inherently odious, and the work of statutory and industry ombudsmen has as many points of difference as it does of intersection, it is worth noting that today, industry ombudsman offices in Australia are as large as or larger than statutory ombudsman offices. For example:

- In 2007-08 the TIO[3] received 173,000 contacts, including more than 149,000 complaints. It handled cases about landlines, mobile phones and internet service providers, and dealt with issues from customer service, billings and payments, to faults and contracts. It has a staff of 247[4] officers, and a budget in 2008 of more than $15 million. The Commonwealth Ombudsman, in the same year[5], has recorded around 40,000 approaches across the range of federal and ACT government activities, with a staff of 165 and a budget of $20 million.

- In 2007-08 EWOV[6] handled more than 25,000 cases about the customer service, billing, credit and other activities of electricity, gas and water providers. Its income of just over $6 million was only slightly less than the $6.7 million income of Ombudsman Victoria[7], which recorded around 16,500 approaches in its role in dealing with complaints about services provided by the Victorian Public Sector.

There is, of course, conjecture about why industry ombudsman schemes have been set up. Some schemes, such as the Insurance Ombudsman Bureau in the UK, were set up by industry itself – and without government involvement[8]. The creation of some industry ombudsmen has been said to be a direct response to the privatisation of government businesses, and the removal of traditional administrative law remedies, including statutory ombudsmen[9]. The set-up of others has been credited to pressure applied by the consumer movement, or a move to self regulation to forestall direct regulatory intervention[10].

Whatever the reason, industry ombudsmen are now an entrenched part of the landscape. I am deliberately vague here, as some would say that we are part of the public or administrative law landscape[11], others the consumer law landscape[12].

Most industry ombudsmen, and indeed most statutory ombudsmen, are members of the Australian and New Zealand Ombudsman Association ('ANZOA'). ANZOA membership is a guarantee that the ombudsman's office has been assessed against national benchmarks for independence, impartiality and effectiveness.

The second matter is the National Benchmarks for Industry–Based Customer Dispute Resolution Services[13] ('the National Benchmarks'), released by the Federal Government in 1997, which provide a consistent framework for industry ombudsman offices. The National Benchmarks are based around 6 principles: accessibility, independence, fairness, accountability, efficiency and effectiveness. Key practices in the benchmarks include some of the basic tenets of the work of an industry ombudsman:

- that customers do not pay to make a complaint or to have it investigated;
- that a non-adversarial approach – including the use of conciliation and mediation – is used to settle complaints;
- that the decision maker – the ombudsman – is independent of scheme members;
- that the ombudsman's office publishes written reports of determinations and a detailed annual report of activities; and
- that the scheme is regularly reviewed by an independent party, and the results made available.

Perhaps the best known key practice is that ombudsmen make determinations based on what is fair and reasonable, having regard to good industry practice, relevant industry codes and the law.

Fair and reasonable

Most industry ombudsman charters or terms of reference contain some requirement to deal with matters in a fair and reasonable way. The PTO, for example, is to resolve complaints and disputes '*having regard to what is fair and reasonable for the members and complainant, good-industry practice and current law*'[14].

A survey of industry ombudsman schemes, conducted for the purpose of developing the PTO's approach to the fair and reasonable criterion has shown a general consistency in the approaches taken to determine complaints:

The points of similarity include:

- the law is considered. For one scheme, this specifically includes considering judicial authorities;
- codes of practice, both self-regulatory and imposed, are taken into account;
- good industry practice is considered. One scheme specifically recognised that this may result in a standard that is above the duty or requirement owed at law;
- legal and technical advice is taken – including advice from industry specialists; and
- the particular circumstance of each case is considered. For most, this includes considering customer service performance, or what has contributed to or resulted in the complaint.

The survey also showed that schemes consider precedents. For example:

- one scheme considers previous binding decisions and also case results for similar matters that have been resolved;
- one scheme has a detailed knowledge management system to promote consistent decision making; and
- a number of schemes have or are developing position statements to inform the management of complaints, and promote transparent and consistent processes and outcomes for similar complaints. The PTO has a statement that deals with outcomes for late or no replies to complaints. The TIO has an extensive range of statements on areas such as billings and payments, mobile phones, compensation and privacy, outlining matters such as how matters will be investigated and approaches that will be taken to resolve complaints.

This idea of consistency has been said to be a key aspect of fairness, making sure like cases are treated in a like manner[15].

One scheme has a criterion that the decision could be held up to the scrutiny of scheme members, ombudsman peers and the community at large.

The final aspect universally considered was fairness, variously described as:

- what the average person would regard as a fair outcome;
- what the ordinary person in the street would think was fair; and
- allowing the tempering of a strict application of the law with considerations of equity and good conscience.

There is, however, little additional guidance to promote an understanding of the "fair and reasonable" concept.

Sometimes the approach is based on what a court would do in a similar circumstance[16]. Others have emphasised that, in making decisions, legal principles cannot be ignored and form part of the background reasoning, with an overriding obligation to make decisions that are fair and reasonable in all the circumstances[17].

In their article *In Defence of Consumer Law: The Resolution of Consumer Disputes*[18], Paul O'Shea and Charles Rickett examine the decision making of industry ombudsmen schemes. They conclude that industry ombudsmen operate on the basis of the application of flexible standards and principles. They do not contradict the general body of law but rather seek to reach outcomes by the use of open-textured guidelines which provide considerable discretion in the determination of any particular consumer dispute.

This view is reflected in the writing of Richard Nobles for the Modern Law Review[19]. His article examines a 2002 English Court of Appeal decision, *Norwich and Peterborough Building Society v The Financial Ombudsman Service*[20], and divines a division of labour between the Courts and ombudsmen schemes. Courts have the role of interpreting rules or laws. Ombudsmen assess what is fair – a broad concept where reasonable people are permitted to disagree – and Courts would only intervene if an ombudsman's decision was legally irrational. Nobles states that moving to general standards of fairness, guided by principles, overcomes some of the limitations inherent in rules. Ombudsmen, with close relationship to and good knowledge of the industry in question, are well placed to undertake this task.

The question of industry ombudsmen and their approach to decision making has been considered by the Courts on a number of occasions.

- In *Citipower P/L v Electricity Industry Ombudsman & Anor*[21], Justice Warren considered whether a decision of the Victorian Electricity Ombudsman that required Citipower to make payments to complainants to whom it supplied energy, who suffered losses as a result of interrupted power supply, was beyond the ombudsman's power.

  The Court accepted that the Ombudsman was entitled to bring into account matters within her own knowledge, here concerning the ability of Citipower to make arrangements to maintain electricity supply. The Court's reasons supported the use of accumulated knowledge by the Ombudsman to determine current law and practice that she was required to bear in mind when determining the matter.

  Citipower also argued that the Ombudsman wrongly determined that the power supply interruption at the heart of the dispute was within Citipower's control. The Court stated that it would only substitute its own view on this question if the determination of the Ombudsman was so aberrant as to be irrational.

- In *Australian Communications Authority v Viper Communications P/L*[22], Justice Sackville, in the Federal Court, considered whether provisions in the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) – which required telecommunications providers to be member of the TIO, conferred judicial power on the TIO.

  In determining that there was no constitutional infringement, the Court stated that the legislation did not require the TIO to make decisions by applying settled legal principles to the facts of particular cases, and instead contemplated that in some circumstances the Ombudsman will create norms to resolve disputes. The Court noted that many of the complaints the TIO might deal with – such as back-billing and lack of telephone number portability – would be difficult to resolve by the application of established legal norms. In addition, the TIO constitution contemplated the Ombudsman taking a flexible approach

to resolving complaints, and the Ombudsman was free to create norms to resolve particular disputes or classes of dispute.

- In *Masu Financial Management P/L v Financial Industry Complaints Service and Wong (No 1)*[23], Justice Shaw of the NSW Supreme Court considered whether the Financial Industry Complaints Service ('FICS'), now a part of the FOS, exercised judicial power. The case arose from a FICS determination that the plaintiff, a financial advisor and member of the FICS scheme, refund consultancy fees and other amounts to Ms Wong.

  FICS was required under its terms of reference, in determining complaints, to do what was fair and reasonable in all the circumstances, having regard to criteria including any applicable legal rule or judicial authority, general principles of good industry practice and any applicable code of practice.

  The Court noted that while FICS was required to have regard to existing legal rights and obligations, it was not bound to apply any particular legal principle but instead to have regard to such principles. In finding that FICS exercised administrative or arbitral powers, as against judicial powers, the Court stated that FICS determinations '*create new rights and obligations designed to achieve fairness, in a broad sense, between the parties rather than amounting to the performance of the traditional task of a court, namely the ascertainment and enforcement of existing legal rights*'.

  The ultimate decision in that matter was for the complaint to be remitted to a different decision maker within FICS, on the basis that the financial advisor was not provided with procedural fairness, in that he was not given notice of a matter ultimately considered by FICS in determining the matter. The Court also found there was a deficiency in the reasons of FICS – about both the right to and amount of compensation awarded.

- Most recently, in *Wealthcare Financial Planning P/L v FICS & Ors*[24], Justice Cavanough in the Supreme Court of Victoria, in determining that FICS was not obliged to apply principles of proportionate liability when determining a complaint, noted that FICS entertains complaints, not causes, and determinations create new rights and obligations between parties rather than declaring existing rights.

  The Court accepted that FICS is required to have regard to all law – both statutory and judge made – that is relevant and capable of being applied. However, bearing in mind that the central task of FICS was to do what is fair in all the circumstances, having regard to specified matters, the Court found that the position of FICS was not more constrained that that of the TIO. FICS was not required to make determinations on the basis of the application of laws to facts as found, and is free to create norms to resolve disputes.

These Australian decisions reflect the approach more recently taken in the United Kingdom. Most notably, the Court of Appeal in *Heather Moor & Edgecomb Ltd, R (on the application of) v Financial Ombudsman Service & Anor*[25] *('Heather Moor')* considered a decision of the UK Financial Ombudsman directing a financial advisor to pay an amount of up to £100,000 for poor advice given to a soon to retire airline pilot.

The UK Financial Ombudsman is somewhat different to the Australian counterpart, in that some aspects of the ombudsman's powers are enshrined in statute. Some complaints, it is stated, are to be determined by '*what is, in the opinion of the Ombudsman, fair and reasonable in all the circumstances*'[26]. However, the rules of the ombudsman scheme reflect Australian practice, requiring the ombudsman to taken into account relevant law, regulations, regulators' rules, codes of practice and good industry practice.

The Ombudsman's determination specifically stated: '*While I have taken into account the relevant law, I have determined this complaint based on what, in my opinion, is fair and reasonable bearing in mind all the circumstances of this case*'.

The financial advisor sought judicial review, contending that the Ombudsman was required to determine complaints in accordance with the law, and not by reference to what is fair and reasonable. The Court rejected this contention, and accepted that if the Ombudsman considers that what is fair and reasonable differs from English law, then the Ombudsman is free to make an award in accordance with that view, provided the view is a reasonable one in all the circumstances. The Court cited statements of the Chief Ombudsman there, that the "fair and reasonable" jurisdiction allows the Ombudsman to look beyond the law, beyond the wording of the small print, to take into account the large print in promotional material, good industry practice, and if necessary adopt a modern and fairer approach where is it clear that the law has lagged behind.

Both judgments in *Heather Moor* make clear the obligation to take relevant laws and other defined matters into account, and the leading judgment of Lord Justice Burnston suggests that where laws are not followed, the Ombudsman should explain why.

The judgment of Lord Justice Rix notes the development by the Insurance Ombudsman in the UK of a new common law of insurance for consumer contracts – in respect of the effect of non-disclosure by policy holders. He noted that it was possible to see in the "fair and reasonable" jurisdiction an important new source of law.

Some observations

There are a number of propositions that can be drawn when considering "fair and reasonable" for industry ombudsmen:

- first, "fair and reasonable" does not equal "according to law". Relevant laws must be considered. Often, the application of these laws will result in a fair and reasonable outcome. Where legal rules are departed from, this should be explained. An ombudsman's job is not to determine and enforce existing rights, but to create new rights between the parties having regard to the fairness in the particular case.

- second, persons may differ in their assessment of what is "fair and reasonable" in a particular case. Courts appear to acknowledge the special position and industry knowledge of ombudsmen that will inform the view they take. Court decisions suggest that judges generally will not intervene where errors are made within jurisdiction. However, there is a willingness to consider intervening where the decision of an ombudsman is an irrational one, or a party has not been afforded procedural fairness.

- third, ombudsmen across very different industries appear to have adopted the same "fair and reasonable" standard, informed by the same type of criteria, when making decisions. When determining insurance disputes or public transport complaints, ombudsman will consider the same sorts of matters – the relevant law, industry codes and practice, the individual circumstances of the case, and what an average person might think is fair, when making decisions and resolving disputes. I think an important driver of this consistency has been the establishing of National Benchmarks. These provide an objective touchstone for industry ombudsmen in arranging their decision making processes and procedures.

- fourth, industry ombudsmen are approaching decision making having regard to general and flexible principles of fairness and reasonableness. This is informed by the law, and

will often result in outcomes that are the same as would have been achieved if the matter had been heard before a court. However, the use of flexible principles to guide decision making assists when dealing with disputes not readily amenable to the legal method.

- fifth, ombudsmen have been concerned, while emphasising a flexible approach, to make sure there is also a consistent approach. It is, of course, only fair that like matters have like outcomes. Ombudsman schemes have sought to achieve this through a range of methods, including publishing decisions, having regard to previous results when considering new matters, and publishing ‘position statements’ or similar documents to outline how different types of matters will be approached.

- sixth, that the application of "fair and reasonable" across a range of cases within an industry may lead to a new source of law, or standards, or expectations. industry ombudsman will establish new norms within an industry when dealing with complaints and determining cases, informed by what is “fair and reasonable”. The result may be that changes occur within the industry as to how it approaches common causes of consumer complaints.

There is one final aspect: the role of industry ombudsmen beyond resolving individual complaints. Where a complaint raises a systemic issue – that is, the issue that affects more customers than the person who has complained – the ombudsman will look to service providers to provide a redress to all affected persons. This jurisdiction is, in my view, a logical extension of the fair and reasonable approach and a further point of distinction from court processes. It is only fair, when a service provider is aware of an issue that affects a number of persons, that steps are taken to provide redress to all, and not only the persons who complain. It is also reasonable to expect service providers to change their own practices, as part of a systemic solution to a problem that is resulting in unfair outcomes to consumers.

Fairness and reason are powerful concepts, deeply ingrained in the Australian psyche through our commitment to a fair go. This perhaps goes some way to explaining the success of industry ombudsmen in the recent past.

At the heart of administrative law lies public accountability of government and administrative justice for the individual[27]. In providing fair and reasonable outcomes for individuals in the provision of public services and new norms in the provision of those essential services, industry ombudsmen have a unique role to play in new

Endnotes

1 Paul O’Shea, 'The Lion’s Question applies to Industry-Based Consumer Dispute Resolution Services' (2006) *The Arbitrator and Mediator* Vol 25/1, page 63.

2 For example:
- s 128 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) provides, in effect, that telecommunications carriers, telephone carriage providers and Internet Service Providers must be members of the TIO.
- s 912A(2) and 1017G(2) of the *Corporations Act 2001* (Cth) (Corporations Act) require financial services licensees and others to have membership of one or more ASIC-approved external dispute resolution schemes (such as BFSO).
- Melbourne metropolitan tram and train operators are required, by terms of their franchise agreements, to be members of the PTO scheme.

3 TIO Annual Report – 2007-08.

4 TIO Member News, July 2009.

5 Commonwealth Ombudsman Annual Report 2007-08.

6 EWOV Annual Report 2007-08.

7 Ombudsman Victoria Annual Report, 2007-08.

8 '*Is the Ombudsman Fair and Reasonable'*, speech by Walter Merricks, Chief Ombudsman, Financial Ombudsman Service (UK).
9 Anita Stuhmcke, 'Administrative Law and Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry' (1997) 4 *AIAL* 185.
10 note 2, above
11 *Masu Financial Management P/L v FICS and Wong (No 1)* [2004] NSWSC 826.
12 Paul O'Shea and Charles Rickett, 'In Defence of Consumer Law: The Resolution of Consumer Disputes' (2006) 28 *Sydney Law Review* 139.
13 First published by the Consumer Affairs Division, Department of Industry, Science and Tourism, in April 1997.
14 Public Transport Ombudsman Ltd Charter.
15 note 9 above
16 FAQs – Financial Ombudsman Service (UK), http://www.financial-ombudsman.org.uk
17 *Fair and reasonable decision-making, the law and non-disclosure reform*, Karen Stevens, New Zealand Insurance and Savings Ombudsman.
18 note 11 above
19 'Rules, Principles and Ombudsmen, Norwich and Peterborough Building Society v The Financial Ombudsman Service' (2003) 66 *Modern Law Review* 781.
20 [2002] EWHC 2379
21 [1999] VSC 275
22 [2001] FCA 637
23 [2004] NSWSC 826
24 [2009] VSC 7
25 [2008] EWCA Civ 642
26 *Financial Services and Markets Act 2000* (UK), s 228.
27 Robin Creyke and John McMillan, *Administrative Law Assumptions … Then and Now*, in *The Kerr Vision of Australian Administrative Law* (The Centre for International and Public Law, Faculty of Law, ANU, 2008).