

## **What we need from Ombudsman today – views from the outside**

**Thursday 5 May, 11.15am – 12.30pm – Laneway rooms,  
Intercontinental, The Rialto**

Thank you for the invitation to speak today. I'd like to acknowledge the traditional owners of the land on which we meet, and pay my respects to elders.

For those that don't know of Consumer Action Law Centre, we are a Melbourne-based consumer organisation. We provide free legal advice and representation to Victorian consumers, free financial counselling as part of the National Debt Helpline, and promote the consumer interest through policy and campaign activities.

Our mission is "Just outcomes, for and with consumers" – and our organisational goals include challenging business models and practices that disadvantage consumers, and ensuring that consumers, particularly vulnerable and disadvantaged consumers, benefit from fair and effective competition in consumer markets.

Consumer Action Law Centre has been a strong supporter of industry ombudsman schemes. Our centre's submission to the Productivity Commission's inquiry into Access to Justice was quoted heavily in the final report's discussion about the effectiveness of industry ombudsman schemes.

We stated that the establishment of these schemes has been one of the most significant advances in consumer protection of the past 30 years, and the Productivity Commission endorsed our summary of the design features that have contributed to the performance of these schemes, including:

- Industry ombudsmen are typically a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme
- Industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes
- Industry ombudsmen typically have independent boards with 50 per cent representation from consumers so the dispute resolution processes are fair and balanced
- The ombudsman scheme process provides flexible solutions to disputes but also has teeth because the ombudsman can make findings binding upon the trader
- Ombudsmen are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help bigger problems be solved at their source
- Ombudsmen keep detailed records and make detailed reports that assist the advancement of consumers interests

The other significant benefit I think relates to regular evaluations and reviews, which provides transparency and public accountability about the quality of EDR. This might be with court or tribunal based mediation.

I want to raise two questions today.

The first question I want to ask is why we have not seen new schemes in industry sectors where there is consumer detriment. The second question I want to consider is the opportunity for further consolidation in the EDR sector.

Let's start with the first. By my research, the most recent industry ombudsman scheme that became a member of ANZOA was the Energy Ombudsman of Queensland around ten years ago. Before that there

was the Energy & Water Ombudsman of WA formed in 2005, and the Public Transport Ombudsman in Victoria, established in 2004. All other schemes were established in the 1990s.

So why has there been no new schemes over the last 10 years? It cannot be denied that there are many areas for which there is no independent redress for customers that are dissatisfied. It's as if there has been a "pause" in the ongoing development of industry-based ombudsman schemes.

The areas that my centre has recently proposed for needing for ombudsman include motor car trading, retirement housing and vocational training. We are also beginning a campaign for the need for a Retail Ombudsman, to cover disputes relating to general consumer law matters.

There have been baby steps towards the development of new ombudsman offices.

The Queensland Government enacted a vocational training ombudsman for that state last year. That new body, however, does not appear to subscribe to all of the generally accepted functions of an industry ombudsman scheme – for example, it doesn't have binding powers, and appears also to be subject to ministerial direction. As this audience knows, an ombudsman is not considered independent if it is under the direction or control of a government Minister.

Also in the training sector, just last week, the Federal Minister for Vocational Training released a discussion paper which canvassed the need for a national ombudsman in that sector. The main driver for this is the high number of complaints caused by poor selling practices.

The recently published issues paper for the review of the Australian Consumer Law also canvasses the idea of an ombudsman for motor vehicle disputes and retail disputes generally.

However, it is my assessment, particularly in political and policy maker circles, that there remains little understanding about the benefits of the industry ombudsman model.

There are of course courts and tribunals that are available to resolve consumer matters. However, these remain out of reach for many ordinary consumer complaints. Let me provide some insight here about my centre's experience of our civil tribunal, the Victorian Civil and Administrative Tribunal. The problems we see are really related to access and effectiveness.

From July 2013, the application fee for small claims quadrupled. It now costs around \$150 to bring a small consumer matter to VCAT. The statistics published by the tribunal tell the story about the impact this fee rise has had on access to the tribunal. Over the two years following the price rise, small claim applications dropped by around 25 per cent. As all ombudsman schemes know, barriers like costs will mean that consumers miss out on access to justice.

Our casework in the area of retirement housing further explains some of the problems here. We are running two significant matters at the moment. The first relates to an 89 year old woman who lives in a holiday village in the south of Melbourne. Her dispute is about an increase in rent of 60% in one year which was charged again for the following two years. Residents tried to form a committee to ascertain why the rise had been so high but the village would not provide this information. So we are assisting her at VCAT. We are seeking a \$6,000 refund over unjustified charges, and also a declaration as to the proper

value of rent – the value of the total refund to all the residents would be about \$1.2m if the claim is accepted.

The resource burden for this type of dispute is enormous. So far we have utilised 110 hours of expert witness evidence, and another expert witness has provided 40 hours. Our client will be represented by 1 junior barrister and a QC at the 5 day trial. That doesn't count the time our lawyers have put into it.

VCAT have been good so far but we think it's the wrong forum for many consumer disputes, and the burden of proof in this case is enormous – going to VCAT would be impossible for an individual without legal representation. Several other residents commenced VCAT proceedings against the village but abandoned their claims because the dispute is too complex and the retirement park had legal representation. The cost of the park's legal representation was subsequently charged to the residents.

We're running a second case on behalf of a group of retirement park residents challenging a deferred management fee. This is a type of exit fee that is commonly charged in retirement villages, and can be up to 30 percent of the property value. It is generally charged on top of ongoing management fees. I won't go into detail about this case, other than to say that dispute resolution issues include requiring our clients to file separate and detailed applications, requiring our elderly clients to personally attend directions hearing, and an early attempt at mediation which only drew out and delayed resolution.

Another disadvantage of the civil claims tribunal in comparison to EDR schemes is the quality of mediation. At ombudsman schemes, the role of regular external reviews and internal quality assurance is important. In our experience, these sort of frameworks do not exist in civil claims tribunals which commonly use mediation processes. The problem here

of course is where there is significant power imbalances in mediation. I'll give one example from our casework.

Our client of Sudanese background had a dispute with a motor car trader in relation to a second hand vehicle with a number of defects. Our client had tried to resolve the matter directly with the trader to no avail, so made an application to VCAT seeking a refund of the \$15,000 paid or the vehicle to be repaired.

VCAT heard evidence from both parties on the first day of the hearing, including an expert mechanic providing evidence on behalf of our client. The hearing also involved an interpreter.

Despite this hearing and the expectation that the member would use the evidence to make a decision, the matter went to mediation on the second day after suggestions by the VCAT member that 'this is the type of matter that should be resolved by the parties'.

The mediator, who appeared not to have reviewed the claim or evidence, made a number of troubling representations to our client, including that our client would only be entitled to a \$2,000 refund, that VCAT almost never made orders in relation to second hand vehicles, and that it was in our client's interests to accept any offer made. By this stage our client was exhausted, and was almost willing to consent to any outcome. Taking our solicitor's advice, our client did push on and seek an order from VCAT. The final order was in the consumer's favour, being a much better outcome than that which was considered possible at mediation.

I'd like to compare the situation with external dispute resolution in the UK, where there seems to be a growing number of ombudsman to resolve consumer disputes.

In addition to ombudsman covering financial services, energy and telcos, there is a property ombudsman covering real estate agents, a housing ombudsman covering housing associations and some private landlords, and a higher education ombudsman. There is also a removals ombudsman covering the removals industry, there is even a furniture ombudsman and a glazing ombudsman. Most recently there have been set up what look like to be competing retail ombudsman and consumer ombudsman to cover online and high street retail businesses.

One of the drivers in the UK has been the European Union directive on alternative dispute resolution. This ADR Directive ensures that consumers have access to ADR for resolving their contractual disputes with traders. Access to ADR is ensured no matter what product or service they purchased (only disputes regarding health and higher education are excluded), whether the product or service was purchased online or offline, and whether the trader is established in the consumer's Member State or in another Member State.

The directive also says that ADR providers must fulfil certain requirements around quality assurance, and that they will be certified and monitored by competent authorities. There are also requirements on business to provide information about certified ADR providers on their websites or sales contracts in certain circumstances, and in the event of an unresolved dispute, all businesses must provide information about certified ADR providers.

In the UK, this directive is currently being implemented, and it is driving more ombudsman services. It is also driving consolidation among ombudsman services – for example it is one body, known as Ombudsman Services Ltd, that has jurisdiction in energy, telecommunications, property and home improvement.

This leads me to the second question I flagged at the outset – whether similar consolidation is likely to benefit consumers in Australia. I think there are a couple of reasons why this might be so. First, there is the issue of convergence.

We are seeing more complex consumer contracts breaking down the lines between industry sectors. For example, we are now regularly seeing complaints around solar panel leasing arrangements – which might be regulated as a credit contract, or might be regulated as an energy contract, depending on the structure of the contract. We're also seeing big telco companies like Telstra entering into the energy market.

Second, it appears that governments are also looking into consolidation. The Productivity Commission in its Access to Justice Report recommended the rationalisation of ombudsman services. Following this, the Private Health Insurance Ombudsman was rolled into the Commonwealth Ombudsman, although it does retain its own identity.

Only a few weeks ago, the Federal Government announced a review to look at the Financial Ombudsman Service, the Credit & Investments Ombudsman and the Superannuation Complaints Tribunal, noting the potential to create a one-stop shop. It was suggested that there can be consumer confusion about which scheme should deal with a particular issue.

While confusion is an issue, the bigger issue when it comes to multiple schemes is that the system tends to benefit industry rather than consumers. Between FOS and the CIO, for example, it is not consumers who can choose which scheme to approach, but industry members that can choose which scheme to be a member of. This inevitably creates the risk of placing cost efficiencies above quality consumer outcomes.

ANZOA has long had a policy statement that states that competition between industry ombudsman is undesirable, and I commend the organisation for that.

In that statement, ANZOA states that there are other appropriate mechanisms which provide a proxy for the benefits that can otherwise be derived from competing services. These mechanisms include appropriate governance arrangements, independent reviews, public reporting, effective self-regulatory or regulatory mechanisms, benchmarking, formal or informal peer reviews, and scrutiny through avenues such as ANZOA.

Consumer advocates support this reasoning. However, I wonder whether it is now time for ANZOA to develop a policy statement that extends the benefits of industry ombudsman schemes to other areas of consumer concern. A policy statement similar to the EU directive might help us develop the policy environment that encourages more and better EDR, so that consumers benefit across more areas of customer complaint.

Thank you.

END.